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IN THE

Supreme Court of the United States

REPUBLIC OF AUSTRIA AND ÖSTERREICHISCHE INDUSTRIEHOLDING AG,
Petitioners,

v.

DORIT WHITEMAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Foreign Sovereign Immunities Act of 1976 applies retroactively to govern a foreign state's assertion of immunity from suits alleging injuries that predate the statute's enactment.

2. Whether a putative class action that seeks restitution from a foreign government and foreign entities for property deprivations during the National Socialist era and World War II presents a nonjusticiable political question, particularly when the suit impedes an international agreement with the United States under which the foreign sovereign created a comprehensive and exclusive process for remedying such claims.

PARTIES TO PROCEEDINGS BELOW

The caption lists as petitioners the sovereign defendants Republic of Austria and Österreichische Industrieholding AG, a corporation wholly owned by the Republic of Austria. The remaining defendants, who are not before the Court, are Dorotheum GmbH, a/k/a Dorotheum Auktions-, Versatz- und Bankgesellschaft mbH, Voest-Alpine Stahl AG, VA Technologie AG, Böhler Uddeholm AG, OMV AG, Raiffeisen Zentralbank Österreich A.G., Steyr-Daimler-Puch AG, a/k/a Steyr Daimler Puch Spezialfahrzeug AG, a/k/a Steyr Daimler Puch Fahrzeug Technik AG, Uniqa Versicherungen AG, Austrian Doe Corporations 1 to 100, and Erste Bank der Oesterreichischen Sparkassen AG.

The plaintiffs not listed as respondents in the caption, but reflected as "*et al.*," are Alfons Sperber, Hertha Field, Alice Jay Sussman, Anitta Lea, Robert Weinberger, Rudolf Auspitz, Max Uri, Fritzi Uri, Leo Granierer, Sophie Haber, Gertrude Fiala, Harriet Mehl-Rottenberg, Gerda Feldsberg, Alexander-Sandor Fürst, Ernst B. Rivin-Riesenfeld, Lizzy Rapp-Bauer, Ruth Davidovits, Dorothea Winkler, Erich Richard Finsches, Michael Schwarz, Heinz Bischitz, Lottie Meczes-Schwenk, Luge Svoboda, Friederike Herzl, and Robert Klein.

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PETITION FOR WRIT OF CERTIORARI

The federal courts of appeals are divided over the correct standard for evaluating whether plaintiffs can sue foreign sovereigns in United States courts for alleged injuries that predate the 1976 enactment of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §1602 *et seq.* In considering whether federal jurisdiction extends to a suit against the Republic of Austria and its instrumentalities alleging deprivations of property during the German Nazi Regime, the Second Circuit ignored well-settled law from this Court and other circuits establishing that all foreign nations enjoyed absolute immunity during the World War II era. The court erroneously held, instead, that retrospective application of the FSIA's immunity exceptions turns on a fact-intensive,

case-by-case analysis of the State Department's policy toward the defendant sovereign at the time of the events giving rise to suit.

The Second Circuit's analysis shares similarities with the Ninth Circuit's recently adopted, ad hoc immunity test for World War II-related claims, but it conflicts with better reasoned decisions from the Eleventh and D.C. Circuits. These courts correctly recognize that all foreign sovereigns had a settled expectation of absolute immunity prior to 1952 and, therefore, have refused to apply the FSIA's immunity exceptions to suits based on pre-1952 conduct.

The circuits' disparate treatment of foreign sovereigns injects uncertainty and unpredictability into international relations and, in this case, impedes a January 2001 agreement between Austria and the United States through which Austria established a $210 million General Settlement Fund to comprehensively and exclusively resolve World War II-related claims by Holocaust survivors and other victims of the Nazi era. The susceptibility of foreign nations to suits in United States courts for alleged conduct prior to the enactment of the FSIA presents an important and unsettled question of federal law that implicates Executive Branch policy, affects international diplomacy, and warrants the Court's immediate attention. The Court should resolve the conflict over retrospective application of the FSIA by granting the petition for writ of certiorari and reversing the Second Circuit's judgment. *See* SUP. CT. R. 10(a), (c).

CITATION OF OPINIONS AND ORDERS

The Second Circuit's opinion, App. 1a, is not published in the Federal Reporter but is available at 2003 WL 21890843 (CA2 Aug. 6, 2003). The district court's order effectively denying Austria's motion to dismiss, App. 11a, is unpublished. The order denying Austria's motion for reconsideration, App. 16a, is available at 2002 WL 31368236 (S.D.N.Y. Oct. 21, 2002).

BASIS FOR JURISDICTION

The Second Circuit delivered its judgment and opinion on August 6, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254.

STATUTES INVOLVED

The appendix includes the relevant provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602, 1604-05. App. 32a-40a.

STATEMENT OF THE CASE

This putative class action arises from takings of property from Austrian Jews that occurred on the territory of the present-day Republic of Austria during the National Socialist era and World War II. Between 1938 and 1945, the German Reich occupied Austria and confiscated from Austrian Jews and other victims personal and household possessions, businesses, legal and medical practices, private flats, and other personal and real property. The reprehensible nature of the Nazi Regime's acts is undisputed. At issue, rather, is whether a United States court can exercise jurisdiction over the Republic of Austria and its instrumentality Österreichische Industrieholding AG (collectively Austria) for purposes of adjudicating the plaintiffs' property-deprivation claims.

The governments of Austria and the United States share the goal of justly and expeditiously compensating Austrian victims of the Holocaust. *See* App. 47a-68a, 83a-90a. The restitution efforts of present-day Austria began almost immediately after the Allied victory ousted the German Reich in the spring of 1945. App. 63a. Most recently, Austria created the $210 million General Settlement Fund (GSF). The GSF resulted from a January 2001 executive agreement between Austria and the United States, as well as extensive negotiations with victims'

representatives, including the Conference on Jewish Material Claims, which serves as an umbrella organization for groups such as the American Jewish Congress, B'nai Brith International, the World Jewish Congress, and the Central Committee of Jews from Austria in Israel. App. 50a-51a & n.3; App. 91a. The GSF provides a comprehensive and exclusive remedy for outstanding claims against Austria and Austrian companies by victims of Nazi-era persecution, including claims brought by victims' heirs and communal organizations. App. 54a-60a; App. 91a-115a.

Recognizing that plaintiffs' claims in this case would be covered by the GSF, *see* App. 60a,[1] the United States filed a statement of interest in the district court urging dismissal of the suit. The statement of interest described the GSF as the "fulfillment of a half-century effort to complete the task of bringing a measure of justice to victims of the Nazi era," App. 65a, and declared that "[i]t is in the foreign policy interests of the United States for the GSF to be the exclusive forum and remedy for the resolution of all claims asserted against Austria and/or Austrian companies arising out of or relating to the National Socialist era or World War II." App. 61a. As the United States explained, the GSF "not only fulfills the foreign policy interests of the United States, but also provides benefits to the public interest that reach beyond the scope of any single litigation." App. 80a.

One of the reasons the United States joined Austria in seeking dismissal of plaintiffs' suit is that no payments from the GSF can be made until Austria obtains "legal peace"—

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[1] The only claims excluded from GSF coverage are forced- and slave-labor claims that fall under Austria's Reconciliation Fund, which was established under an October 24, 2000 executive agreement between Austria and the United States, and claims for *in rem* restitution of works of art. App. 61a. Neither type of claim is advanced in the plaintiffs' live complaint.

i.e., cessation of all private litigation against Austria and Austrian companies regarding Nazi-era claims filed as of June 30, 2001. App. 65a; App. 92a, 110a. Because plaintiffs commenced this action prior to June 30, 2001, *see* App. 60a, the continued pendency of this suit prevents disbursement of GSF funds to any victims of the Nazi Regime. *See* App. 65a. Accordingly, the United States argued that the continued exercise of federal jurisdiction over Austrian defendants in this suit would thwart the "important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era, who are elderly and dying at an accelerated rate, in their lifetimes." App. 61a.

In moving to dismiss plaintiffs' claims, Austria asserted its long-established entitlement to absolute immunity from suits based on conduct committed prior to 1952. That was the year the State Department first adopted the "restrictive" theory of foreign-sovereign immunity later codified by Congress through the 1976 enactment of the FSIA. *See, e.g.*, App. 69a-70a; App. 32a (28 U.S.C. §1602). Plaintiffs' complaint defined their lawsuit as being "brought on behalf of all present and former citizens and residents of Austria of Jewish descent who, in and after 1938 and prior to on or about May 8, 1945, were victims of Nazi persecution." First Amend. Compl. ¶2. Austria argued that it was absolutely immune from suit in the United States for this pre-1952 conduct. Further, Austria contended that, even if the FSIA's restrictive theory of foreign-sovereign immunity applied, plaintiffs' allegations failed to establish a *prima facie* case under any of the FSIA's immunity exceptions. Austria also argued that plaintiffs' suit presented a nonjusticiable political question.

The district court declined to dismiss the claims against Austria and, instead, compelled the parties to "engage in discovery to determine whether the Court has both subject-matter jurisdiction and personal jurisdiction over each

defendant in this case." App. 14a. The court stated that it "need not decide whether the FSIA can be applied retroactively to events predating 1952" because plaintiffs' complaint also generally criticized the current approach of Austria and its institutions to restitution and, thereby, alleged "wrongful post-1952 conduct, which permits the Court to apply the FSIA to the instant action." App. 13a (citing First Amend. Compl. ¶¶16-18, 24).

Austria moved for reconsideration, emphasizing that plaintiffs had failed to state a *prima facie* case for jurisdiction under the FSIA and urging the court to decide, at the threshold, whether plaintiffs' claims present a nonjusticiable political question. The district court again declined to dismiss the case at the threshold based on Austria's absolute-immunity or political-question arguments. App. 18a-19a. Instead, the court reiterated that Austria would be compelled to participate in "jurisdictional" discovery regarding the applicability of the FSIA. App. 31a.

Because the district court's order and refusal to dismiss plaintiffs' claims deprived Austria of its absolute immunity from suit, Austria petitioned the Second Circuit for a writ of mandamus and also appealed the district court's orders. The Second Circuit consolidated Austria's mandamus action and its appeal with an appeal from a final judgment in *Garb* v. *Poland*, which also presented the question whether federal courts have jurisdiction to adjudicate the liability of foreign governments for actions preceding the enactment of the FSIA. App. 6a. In *Garb*, the district court had dismissed claims that the Polish government wrongfully confiscated plaintiffs' land following World War II pursuant to an official policy of encouraging the migration of surviving Jews through dispossession of Jewish property. App. 6a.

Following oral argument in the consolidated Austria and Poland cases, but prior to issuance of the panel's opinion, the Second Circuit decided *Abrams* v. *Societe Nationale des*

Chemins de Fer Francais, which addressed the retroactive applicability of the FSIA to a suit against the French national railroad involving claims arising during World War II. 332 F.3d 173 (CA2 2003), *petition for cert. filed* (U.S. Aug. 19, 2003) (No. 03-284). The Second Circuit cited, in its Austria-Poland opinion, *Abrams*'s holding that "whether or not the FSIA applied retroactively to alleged defenses that occurred prior to the statute's enactment depended on whether the plaintiffs in a particular case 'could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment.'" App. 8a (quoting *Abrams*, 332 F.3d, at 186). The court further explained that "[s]uch a determination requires the District Court to conduct a factual inquiry into the sovereign immunity enjoyed by the particular state—in *Abrams*, France; in the instant cases, Poland and Austria—prior to the enactment of the FSIA." App. 8a.

Noting that *Abrams* had deemed the traditional history of pre-1952 absolute foreign-sovereign immunity "insufficient" to determine the immunity of the French-instrumentality defendant in that case—requiring a remand for further factual development—the Second Circuit in this case also determined that the Austria and Poland cases should be remanded for factual determinations regarding these particular sovereigns' immunity expectations prior to the enactment of the FSIA. App. 9a-10a. The panel suggested that the district court may wish to invite the participation of the State Department, making no mention of the United States's lengthy position statement already on file in the district court. *See* App. 10a. The panel also did not acknowledge pre-*Abrams* Second Circuit precedent, *Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (CA2 1988) (per curiam), which established that all foreign sovereigns enjoyed absolute immunity in United States courts prior to 1952.

In remanding, the Second Circuit noted that "the conduct of foreign relations is delegated to the political branches" and that "the adjudication of claims that risk significant interference with foreign relations policy may raise justiciability concerns." App. 10a n.1 (citing *Am. Ins. Ass'n* v. *Garamendi*, 123 S.Ct. 2374, 2386 (2003)). Nonetheless, the court required Austria to submit to a judicial "factual inquiry" into its entitlement to immunity in United States courts during World War II.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve conflicts over foreign states' immunity from suits that allege injuries predating the 1976 enactment of the Foreign Sovereign Immunities Act. Three other petitions for writs of certiorari presenting this question are either currently pending or soon to be filed with the Court in cases involving World War II-era claims against Austria, France, and Poland. *See Republic of Austria* v. *Altmann*, No. 03-13; *Societe Nationale des Chemins de Fer Francais* v. *Abrams*, No. 03-284; *Poland* v. *Garb*, No. 03-__ (forthcoming). Additionally, the D.C. Circuit recently addressed FSIA retroactivity in the context of World War II-related claims against Japan. *Joo* v. *Japan*, 332 F.3d 679 (CADC 2003).[2]

The recent proliferation of World War II-related suits and the resulting circuit conflict over foreign-sovereign immunity prior to the FSIA's enactment highlight the urgent need for the Court's intervention. The proper standard for evaluating foreign states' immunity from suits based on pre-FSIA conduct is a question of vital international importance that warrants review—both to prevent inconsistency in courts'

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[2] The D.C. Circuit denied Joo's petition for rehearing en banc on August 22, 2003. The petition for writ of certiorari in that case is due on November 20, 2003.

treatment of foreign sovereigns and to remove impediments to Executive Branch efforts to resolve international disputes through diplomatic means. Indeed, the international and diplomatic implications of the issues presented in this case and the active participation of the United States in the proceedings below both strongly suggest that the Court should call for the views of the Solicitor General.

Whether in the context of Austria's petitions in this case and in *Altmann*, France's petition in *Abrams*, or Poland's petition in *Garb*, the Court should resolve whether the FSIA's immunity exceptions may be given retroactive effect.[3] Additionally, the Court should determine whether the political-question doctrine requires courts to dismiss suits that seek restitution from foreign sovereigns for World War II-era injuries.

I. THE RECENT PROLIFERATION OF INCONSISTENT IMMUNITY DECISIONS RAISES IMPORTANT AND UNSETTLED QUESTIONS ABOUT RETROACTIVE APPLICATION OF THE FSIA.

Until this past year, it appeared well settled that foreign sovereigns enjoyed absolute immunity from suits alleging injuries that occurred during the World War II era. Indeed, "complete" foreign-sovereign immunity was the prevailing rule "[f]rom the Nation's founding until 1952." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 n.1 (1989) (citing *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)); *see also The Schooner Exchange*

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[3] Austria urges the Court to resolve this question by granting its petition in this case. If, however, the Court were to grant another petition involving absolute foreign-sovereign immunity and retrospective application of the FSIA's immunity exceptions, Austria requests that the Court hold this petition pending resolution of the other case.

v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Thus, before 1952, the State Department routinely urged foreign-sovereign immunity and "the Judicial Branch deferred to the decisions of the Executive Branch on such questions." *Amerada Hess*, 488 U.S., at 434 n.1; *Verlinden*, 461 U.S., at 486; *see also* App. 69a-72a.

The absolute-immunity rule did not change until 1952 when the State Department adopted the restrictive view of foreign-sovereign immunity in the Tate Letter. *Verlinden*, 461 U.S., at 487; *see also* Letter from Jack B. Tate, Acting Legal Advisor to the State Department, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-15 (1976). The Tate Letter expressed the Executive Branch's new policy of affording absolute immunity only to a foreign sovereign's public acts, as opposed to its commercial ventures. *Verlinden*, 461 U.S., at 487. Congress then codified "this so-called 'restrictive theory of foreign sovereign immunity'" with the 1976 enactment of the FSIA. *Amerada Hess*, 488 U.S., at 434 n.1; *see also Verlinden*, 461 U.S., at 488. The FSIA also created a new restriction not previously recognized in the Tate Letter: an "expropriation" exception to immunity for takings of property rights in violation of international law. *See* 28 U.S.C. §1605(a)(3).

Before last year, courts of appeals correctly recognized that claims predating both the FSIA and the Tate Letter were not subject to immunity exceptions of any kind. *See Carl Marks & Co., Inc.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (CA2 1988) (per curiam) (holding, in affirming dismissal of suit involving bearer bonds issued by the Russian Imperial Government in 1916, that "[o]nly after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions"); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497-98 (CA11 1986) (holding, in affirming dismissal of suit

involving bearer bonds issued by the government of China in 1911, that "to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)").

Recently, however, a dramatic shift has occurred in foreign-sovereign-immunity jurisprudence. Both the Second and Ninth Circuits have departed from the pre-1952, absolute-immunity rule in World War II-related suits against France, Austria, and Poland. *See Garb* v. *Poland/Whiteman* v. *Austria* (consolidated opinion), App. 1a; *Abrams*, 332 F.3d, at 186-87; *Altmann* v. *Republic of Austria*, 317 F.3d 954 (CA9 2002), *petition for cert. filed*, 72 U.S.L.W. 3092 (U.S. June 27, 2003) (No. 03-13). These courts now assess foreign sovereigns' pre-1952 immunity on a case-by-case basis, subjecting foreign states to factual inquiries and other litigation burdens from which they should be absolutely immune as a matter of law. *See Garb/Whiteman*, App. 9a-10a; *Abrams*, 332 F.3d, at 186-87; *Altmann*, 317 F.3d, at 964-67. In essence, the Second and Ninth Circuits have, without supporting historical precedent, engaged in improper revisionism to suggest that the United States's immunity practices during the World War II era were significantly different than what the Court has long been recognized them to have been before 1952. Because these circuits' ad hoc approaches infuse unpredictability into foreign-sovereign-immunity jurisprudence and unjustly deprive foreign states of the absolute immunity to which they are entitled, the Court should grant the petition and resolve whether the FSIA applies to suits based on conduct that occurred prior to 1952.

A. The Courts of Appeals Are Divided Over the Retroactive Applicability of the FSIA.

When a case implicates a federal statute enacted after the events at issue in a suit, a court must determine "whether

Congress has expressly prescribed the statute's proper reach" and, if not, "whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994). The courts of appeals that have grappled with retroactivity under the FSIA have acknowledged the need to assess its retroactive effect in cases based on conduct predating the statute's enactment. *See Joo*, 332 F.3d, at 683-86; *Whiteman/Garb*, App. 7a-8a; *Abrams*, 332 F.3d, at 185-88; *Altmann*, 317 F.3d, at 962-67; *Jackson*, 794 F.2d, at 1497-99. These courts, however, have taken inconsistent approaches to the retroactivity question, leaving foreign sovereigns uncertain about their susceptibility to suit in United States courts.[4]

The retrospective applicability of the FSIA presents a crucial question because the enactment of the statute reflected two important changes in foreign-sovereign immunity. First, it codified the restrictive theory of sovereign immunity

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[4] This petition focuses on the portion of the *Landgraf* analysis over which the courts of appeals disagree: whether applying the FSIA to suits based on pre-1952 conduct causes a retroactive effect. Austria also contends that the statute contains no clear expression of intent to apply the statute to pre-enactment facts; and, to Austria's knowledge, no circuit has held to the contrary on that question. *See Joo*, 332 F.3d, at 685-86 (noting that *Princz v. Fed. Republic of Germany*, 26 F.3d 1166 (CADC 1994), had questioned but expressly left open whether Congress intended the FSIA to apply retroactively, and holding that Congress did not manifest such intent in the statute); *Abrams*, 332 F.3d, at 184-85 (holding that "the rigorous requirement of an unambiguous Congressional direction is not satisfied" in the FSIA); *Jackson*, 794 F.2d, at 1497 (determining that the FSIA's language and legislative history does not overcome the strong presumption against retroactivity); *cf. Altmann*, 317 F.3d, at 964 (assuming, without deciding, that the language of the FSIA does not manifest Congress's intent to apply the statute to pre-enactment facts).

adopted by the United States in the 1952 Tate Letter, which recognized an exception to absolute immunity for foreign states' commercial acts. *See Verlinden*, 461 U.S., at 487; App. 69a. Second, the FSIA created a new "expropriation" exception to absolute immunity that did not exist prior to the statute's 1976 enactment. *See* 28 U.S.C. §1605(a)(3). Because these exceptions removed jurisdictional defenses available to foreign sovereigns prior to 1952—indeed, prior to 1976 for the expropriation exception—they are the kind of statutory changes to which a presumption against retroactivity would apply. *See Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951-52 (1997) (holding that, unlike a statute that merely addresses which court has jurisdiction over a cause, a statute that "*creates* jurisdiction where none previously existed . . . speaks not just to the power of a particular court but to the substantive rights of the parties as well" and, therefore, triggers the presumption against retroactivity); *Joo*, 332 F.3d, at 684 (determining that the FSIA's commercial-activity exception, "by qualifying what previously had been the absolute immunity of foreign sovereigns, also 'creates jurisdiction where none previously existed' and, therefore affects the substantive rights of the concerned parties").

In assessing whether the FSIA has an impermissible retroactive effect when applied to suits based on pre-1952 conduct, the Second and Ninth Circuits have erroneously disregarded the historical origins of the FSIA's commercial-activity and expropriation exceptions. Instead, the Second Circuit requires courts to conduct case-specific and necessarily speculative investigations of State Department policy toward sovereign defendants at the time of the events giving rise to suit. App. 9a-10a (citing *Abrams*, 332 F.3d, at 186-88). And the Ninth Circuit encourages courts to speculate about a particular defendant's immunity entitlement based on (1) the sovereign's immunity policies in its own courts and (2) the likelihood the State Department might have withheld im-

munity from that sovereign defendant based on the particular conduct challenged in the suit. *Altmann*, 317 F.3d, at 964-67.[5] Under either circuit's ad hoc approach, courts impermissibly make foreign-policy judgments that lie within the exclusive province of the Executive Branch, *see Garamendi*, 123 S.Ct., at 2386, and foreign sovereigns must submit to fact-intensive litigation before learning whether a United States court will respect their immunity from suit.

By contrast, the D.C. and Eleventh Circuits appropriately measure the retroactive effect of the FSIA against the historical evolution of the statutory exceptions reflected in the

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[5] Neither history nor the Court's foreign-sovereign-immunity jurisprudence supports the Ninth Circuit's analysis. Although *Altmann* cited *in rem* maritime actions in support of its approach, the issue in those cases was whether a vessel was of a sovereign character, not whether a foreign sovereign enjoyed anything less than absolute immunity. *Compare Altmann*, 317 F.3d, at 965, *with Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945), *and Ex parte Peru*, 318 U.S. 578, 588 (1943).

Additionally, the Ninth Circuit erroneously relied on the "*Bernstein* Letter," 317 F.3d, at 966, a 1949 document submitted to the Second Circuit by the State Department in an appeal involving private parties and the act-of-state doctrine. *See Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (CA2 1954). The letter advised the Second Circuit that the State Department did not support use of the act-of-state doctrine to bar adjudication of claims involving the validity of acts by Nazi officials. *Id.* Until *Altmann*, however, this so-called "*Bernstein* exception" was confined to act-of-state doctrine arguments in suits involving private defendants and had never been regarded as relevant to foreign-sovereign immunity. *See First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972) (plurality opinion); *id.*, at 776-77 (Brennan, J., dissenting) (noting that six justices in that case had actually rejected the *Bernstein* exception to the act-of-state doctrine); *Zwack* v. *Kraus Bros. & Co.*, 237 F.2d 255, 259-61 (CA2 1956). Tellingly, the Second Circuit did not follow *Altmann* in relying on the "*Bernstein* exception" to the act-of-state doctrine, which originated in the Second Circuit, when it discussed Austria's sovereign immunity in this case.

statute. In *Joo*, the D.C. Circuit assessed whether applying the FSIA's commercial-activity exception to a World War II-era suit against Japan would cause a retroactive effect. Observing that foreign sovereigns typically enjoyed absolute immunity prior to 1952, the court reasoned that "application of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns." 332 F.3d, at 683. And, "because Japan had a settled expectation in the 1930s and 1940s that its commercial activities would not be subject to suit in a court of the United States, application of the commercial activity exception of the FSIA to acts occurring then would clearly be retroactive in effect." *Id.*, at 684.[6]

Similarly, the Eleventh Circuit has correctly recognized that applying the FSIA's statutory exceptions to absolute immunity would be impermissibly retroactive. In affirming the dismissal of a suit against China regarding bearer bonds issued in 1911, the Eleventh Circuit, like the D.C. Circuit in *Joo*, relied on the absence of a commercial-activity exception to absolute immunity prior to 1952. *Jackson*, 794 F.2d, at 1492-93, 1497-98. The court concluded that "to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)." *Id.*

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[6] The D.C. Circuit noted in *Joo* that the Ninth Circuit reached a different retroactivity conclusion in *Altmann* and commented that even the Ninth Circuit's rationale would not compel a different immunity conclusion regarding Japan because weight would be given to a 1951 treaty in which the United States and Japan agreed to resolve all World War II-related matters without court intervention. 332 F.3d, at 684-85. Additionally, the "*Bernstein* letter" that informed the Ninth Circuit's analysis was not directed at Japan. *Id.*, at 685. The D.C. Circuit's actual holding, however, rested on the general tradition of absolute foreign-sovereign immunity before 1952, *id.*, at 683-84, not on *Altmann*'s reasoning.

In using the history of foreign-sovereign immunity as the benchmark for retroactivity under the FSIA, the Eleventh and D.C. Circuits have correctly recognized that the FSIA's exceptions to absolute immunity abrogated substantive immunity defenses that were universally available to all foreign sovereigns prior to 1952. *See Joo*, 332 F.3d, at 683-84; *Jackson*, 794 F.2d, at 1492-93, 1497-98. The United States confirmed the propriety of these courts' approaches in its position statement in the district court, which explained that Austria's entitlement to immunity in this case is governed "by the principles of sovereign immunity that prevailed during the 1940's," and "these principles dictate that Austria is immune from suit here." App. 71a (reaffirming the government's position, prior to 1952, that "foreign sovereigns and their public property are . . . not . . . amenable to suit in our courts without their consent") (alteration in original) (quoting *Guar. Trust Co. of N.Y.* v. *United States*, 304 U.S. 126, 134 (1938)).

By permitting case-by-case departures from the pre-1952 absolute-immunity rule, the Second and Ninth Circuits interfere not only with foreign sovereigns' "antecedent rights," but also with "antecedent principles of law that the United States followed until 1952." *Joo*, 332 F.3d, at 683 (quoting *Jackson*, 794 F.2d, at 1497-98). Their speculative approach defeats Congress's intent to facilitate uniformity in foreign-sovereign-immunity jurisprudence through the enactment of the FSIA. *See Verlinden*, 461 U.S., at 487-88. To avoid unpredictable and inconsistent treatment of foreign sovereigns, the Court should grant Austria's petition and determine whether the FSIA may be applied retroactively to pre-1952 events to overcome the immunity from suit in United States courts that Austria and other foreign states enjoyed at the time plaintiffs' claims arose.

B. The Second Circuit's Ad Hoc Test Requires Factual Inquiries and Unnecessary Court Proceedings That Negate Absolute Immunity.

The Second Circuit's fact-intensive and revisionist approach to immunity, both in this case and in *Abrams*, not only disregards foreign-policy norms, but also is irreconcilable with the very concept of absolute immunity. "[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985). Accordingly, an immune party is entitled to freedom from the "burdens of litigation," *id.*, at 526, including the burdens of discovery. *See Phoenix Consulting, Inc.* v. *Republic of Angola*, 216 F.3d 36, 39 (CADC 2000); *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (CA5 2000).

By unnecessarily prolonging the proceedings a foreign sovereign must endure before obtaining an immunity determination, *see* App. 9a; *Abrams*, 332 F.3d, at 187-88, the Second Circuit compels foreign sovereigns to forfeit much of their immunity before even receiving a ruling on the defense. That perverse result is avoided, however, when the immunity inquiry is governed by a historically and doctrinally accurate application of the absolute immunity that existed before 1952, as it is in the Eleventh and D.C. Circuits. *See Joo*, 332 F.3d, at 683-84; *Jackson*, 794 F.2d, at 1497-98.

The Second Circuit acknowledged that "the general history of United States policy on sovereign immunity is well established," App. 8a, but then inconsistently rejected that history as "insufficient" to determine when the FSIA's immunity exceptions have an impermissibly retroactive effect. Instead, sovereign defendants in that circuit must endure an unnecessary "factual inquiry" into their immunity entitlements before obtaining a ruling on their absolute-immunity defense. App. 9a.

In this case, for example, the Second Circuit envisioned evidentiary submissions from each party regarding the State Department's likely position on Austria's immunity in United States courts during the National Socialist era and World War II. App. 9a-10a. The court did not even acknowledge, in remanding for that investigation, that the United States already had filed a statement documenting that absolute immunity was the prevailing norm during the World War II-era, App. 69a; that, at that time, the United States government would have recommended that Austria be afforded absolute immunity regarding the claims at issue in this suit, App. 70a-71a; and that it is the present-day United States government's foreign policy objective to facilitate implementation of the GSF by advocating Austria's immunity in this and other suits based on conduct that occurred during the National Socialist era and World War II. App. 71a-72a.[7]

Until the Court determines whether immunity determinations under the FSIA uniformly turn on foreign policy as defined by the Executive Branch, or permit ad hoc and ahistorical factual inquiries by the judiciary, foreign sovereigns will sacrifice essential benefits of absolute immunity whenever they seek a ruling on that jurisdictional defense. That price is neither fair nor justified. The Court should grant the petition to ensure that foreign sovereigns receive consistent treatment in United States courts and retain the full benefits of any absolute-immunity defense to which they are entitled.

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[7] The United States reiterated its position in multiple appellate filings and at oral argument before the Second Circuit.

II. THE COURT SHOULD DECIDE WHETHER THE POLITICAL-QUESTION DOCTRINE BARS SUITS THAT SEEK BROAD RESTITUTION REMEDIES FOR WORLD WAR II-ERA CLAIMS.

Foreign sovereigns face uncertainty not only from the conflict over FSIA retroactivity, but also from open questions about the justiciability of suits that ask United States courts to adjudicate foreign nations' liability for injuries that occur during times of war. In this case, Austria has litigated the sovereign-immunity jurisdictional issue against the backdrop of a substantive complaint that, in the plaintiffs' estimation, *see* First Amend. Compl. ¶97, could include hundreds of thousands of claims that arose during a war that ended nearly six decades ago. Moreover, these claims are encompassed by the January 2001 GSF agreement between Austria and the United States, which provides a $210 million fund and a comprehensive and exclusive process for providing restitution remedies to Holocaust survivors and other Austrian victims of the Nazi era. App. 54a-60a, 91a-115a.

Plaintiffs' attempt to supplant the GSF agreement with this litigation obstructs the United States government's foreign-policy goals, App. 61a-66a, and pits the judicial and executive branches against each other in the sensitive area of foreign relations. Additionally, plaintiffs are inviting a United States court to pass judgment on the sufficiency of an international restitution agreement negotiated by the Austrian government and formally enacted into law by the Austrian Parliament. *See* App. 91a. Principles of international comity strongly militate against this result. The Court should grant the petition to clarify whether the political-question doctrine precludes a suit of this nature.

A. The Power to Negotiate and Enter into a Comprehensive Restitution Agreement for World War II-Era Injuries Lies with the Executive Branch.

When a case involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department," that case presents a nonjusticiable political question. *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). Just last term, the Court reaffirmed the President's constitutional "authority to make 'executive agreements' with other countries," *Garamendi*, 123 S.Ct., at 2386, and specifically noted the Executive Branch's diplomatic negotiations with Austria to resolve outstanding World War II-era claims. *Id.*, at 2380-84 & n.3; *see also Deutsch* v. *Turner Corp.*, 324 F.3d 692, 713-14 & n.11 (CA9 2003) ("[T]he Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design."), *petition for cert. filed*, 71 U.S.L.W. 3776 (U.S. June 2 & 4, 2003) (Nos. 02-1773 & 1776).

The statement of interest filed by the United States in the district court declared that "[i]t is in the foreign policy interests of the United States for the GSF to be the exclusive forum and remedy for the resolution of all claims asserted against Austria and/or Austrian companies arising out of or relating to the National Socialist era or World War II." App. 61a. To that end, the United States committed to opposing any challenges to Austria's immunity in suits involving claims governed by the GSF. App. 71a-72a. Courts should not second guess these types of Executive Branch determinations regarding foreign relations. *See Garamendi*, 123 S.Ct., at 2386 (reaffirming the Constitution's allocation of foreign-policy authority to the federal government and the "executive authority to decide what that policy should be");

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803) ("By the constitution of the United States, the President is invested with certain important political powers . . . . The subjects are political . . . and being entrusted to the executive, the decision of the executive is conclusive."); *see also Kelberine* v. *Societe Internationale, Etc.*, 363 F.2d 989, 995 (CADC 1966) (dismissing, as barred by the political-question doctrine, class-action suit regarding forced-labor claims against the successor of a German corporation); *In re Nazi Era Cases Against German Defs. Litig.*, 129 F.Supp.2d 370, 375 (D.N.J. 2001) (holding that plaintiff's World War II-related slave-labor claim must be dismissed as "inexorably linked to the conduct of foreign affairs"); *Iwanowa* v. *Ford Motor Co.*, 67 F.Supp.2d 424, 486 (D.N.J. 1999) (noting, in dismissing suit regarding World War II-era forced-labor claims, that "[t]he executive branch has always taken the position that claims arising out of World War II must be resolved through government-to-government negotiations").

In endorsing the GSF, the United States emphasized that this international agreement "will provide benefits to more victims, and will do so faster and with less uncertainty than would litigation, with its attendant delays and legal hurdles." App. 61a. In addition to the legal hurdle of foreign-sovereign immunity, the United States highlighted the practical and legal obstacles a suit of this nature presents. App. 68a. Because the suit implicates potentially hundreds of thousands of claims that arose on war-torn European soil nearly sixty years ago—and involves, at best, antiquated documentary evidence written in foreign languages and witnesses who are elderly foreign nationals scattered to unknown locations throughout the world—countless practical difficulties abound. The "lack of judicially discoverable and manageable standards," therefore, provides another reason why this type of class-action restitution suit presents a nonjusticiable political question. *Baker*, 369 U.S., at 217; *Kelberine*, 363 F.2d, at 995 (dismissing a class action asserting claims arising

from forced labor at the hands of the Nazis based on the passage of time (then only twenty years) and the court's inability to adjudicate the case without guidance, authorization, or support from the legislative or executive branches); *Burger-Fischer* v. *DeGussa AG*, 65 F.Supp.2d 248, 284 (D.N.J. 1999) (concluding, in dismissing World War II-related, slave-labor claims, that "[w]ere the court to undertake to fashion appropriate reparations for the plaintiffs in the present case, it would lack any standards to apply").

Additionally, foreign-policy objectives other than restitution often factor into international restitution agreements and restitution lawsuits should not thwart these goals. Through the GSF agreement, for example, the Executive Branch sought: to "strengthen the ties between the United States and our democratic ally and trading partner, Austria," App. 63a; to "further the United States' interest in maintaining good relations with Israel and with Western, Central, and Eastern European nations, from which many of those who suffered during the Nazi era and World War II come," App. 64a; "to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions," *Garamendi*, 123 S.Ct., at 2390; and to promote the GSF "as an example to other nations and in other cases where resolution of claims by victims of the Nazi era for restitution and compensation has not yet been achieved." App. 63a. Because these are "policy determination[s] of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S., at 217, they further illustrate why suits of this nature present political questions that are inappropriate for judicial review.

Perhaps most importantly, a suit that implicates an international restitution agreement between the United States government and a foreign nation invites conflict between the judicial and executive branches. The Executive Branch in this case declared its support for the GSF, its desire to facilitate "legal peace" to permit initiation of GSF restitution

payments to victims, and its firm position that Austria is entitled to absolute immunity regarding National Socialist-era claims. App. 65a-68a. The continuance of this litigation in the face of the government's clear pronouncements signals a "lack of respect due coordinate branches," impedes "a political decision already made," and threatens "embarrassment from multifarious pronouncements"—all traditional hallmarks of a political question. *Baker*, 369 U.S., at 217.

B. Uncertainty About the Justiciability of World War II-Era Restitution Claims Subjects Foreign Sovereigns to Disparate Treatment in Different Courts.

Austria's disparate experiences in United States courts illustrate the uncertainty foreign sovereigns face when defending private suits seeking broad resolutions of World War II-era claims. Austria has been compelled to litigate two separate but parallel lawsuits that have been filed in federal courts on opposite coasts of the United States yet raise identical claims—all of which are subject to resolution under the GSF. *See Anderman* v. *Fed. Republic of Austria*, No. CV01-01769FMCAIJX, in the Central District of California; *Whiteman* v. *Republic of Austria*, No. 00-Civ.-8006, in the Southern District of New York.

The *Anderman* court in California correctly dismissed the suit on political-question grounds, 256 F.Supp.2d 1098, 1118 (C.D. Cal. 2003), but the New York district court in this case proceeded with the litigation, ordering Austria to submit to a factual inquiry on FSIA retroactivity without considering whether the political-question doctrine alternatively barred the suit. App. 14a, 18a-19a, 31a. The Second Circuit declined to hold that the district court abused its discretion in this respect. App. 6a. Thus, although either ground for dismissal should have ended the litigation, Austria now finds itself mired in unnecessary fact-based proceedings in a New

York district court on the very same claims a California district court deemed nonjusticiable.[8]

Foreign sovereigns understandably seek an assurance of legal peace as a precondition to resolving outstanding World War II-era suits. And the Executive Branch recognizes that attending to such concerns in the course of diplomacy is important to "the national interest in maintaining amicable relationships with current European allies." *Garamendi*, 123 S.Ct., at 2391; *see also* App. 63a (noting the United States's interest in strengthening relations with "our democratic ally and trading partner Austria," which has "worked with the United States in promoting democracy for the last forty-six years, and is instrumental in the economic development of Central and Eastern Europe"). Until the Court definitively determines the justiciability of World War II-era restitution claims like those at issue in this case—and resolves related conflicts over the retroactivity of the FSIA—uncertainty and unpredictability will cloud foreign relations, and assurances of legal peace will be problematic for the Executive Branch to give and difficult for international negotiators to accept.

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[8] The *Anderman* dismissal remains in limbo because the Ninth Circuit granted the plaintiffs' motion to voluntarily dismiss their appeal without prejudice to reinstating it at a later date. *See Anderman* v. *Republic of Austria*, No. 03-55951, in the United States Court of Appeals for the Ninth Circuit. As of the filing of this petition, the *Anderman* appeal remains dismissed.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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September 30, 2003

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed August 6, 2003]

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of August, two thousand and three.

PRESENT:

AMALYA L. KEARSE,
JOSÉ A. CABRANES,
CHESTER J. STRAUB,
Circuit Judges.

THEO GARB, BELLA JUNGEWIRTH, SAM LEFKOWITZ, PETER KOPPENHEIM, JUDAH WELLER, CHANA LEWKOWICZ, SAMUEL GOLDIN, KARL DIAMOND, HALA SOBOL, SAUL KLAUSNER and GOLDIE KNOBEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v. No. 02-7844

REPUBLIC OF POLAND, MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA), JOHN DOES #1-100 AND MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA),

Defendants-Appellees.

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,

Plaintiffs-Appellees,

v. No. 02-9361

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELL-SCHAFT MBH, ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Defendants-Appellants,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG, a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 TO 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,

Defendants.

In re REPUBLIC OF AUSTRIA, DOROTHEUM GMBH & CO KG, and ÖSTERREICHISCHE INDUSTRIEHOLDING AG,
Petitioners. No. 02-3087

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTALEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,
Plaintiffs-Respondents,

v.

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELLSCHAFT MBH, ÖSTERREICHISCHE INDUSTRIEHOLDING AG,
Defendants-Petitioners,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG, a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 TO 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,
Defendants.

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BERNARD W. NUSSBAUM, Wachtell, Lipton, Rosen & Katz, New York, NY, *appearing on behalf of the Hon. Shirley Wohl Kram, United States District Judge.*

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DOUGLAS HALLWARD-DRIEMEIER (William H. Taft IV, Jonathan B. Schwartz, Wynne M. Teel, Gregory G. Katsas, Mark B. Stern, *of counsel*), Department of Justice, Washington, D.C., *appearing on behalf of Amicus Curiae United States of America in support of Defendant-Appellant Republic of Austria and Defendant-Appellee Republic of Poland.*

Charles Chotkowski, Fairfield, CT, *Amicus Curiae.*

Consolidation of (1) appeal in *Garb v. Poland*, No. 02-7844, from June 26, 2002 judgment entered by the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge*) dismissing plaintiffs' claims; (2) appeal in *Whiteman v. Austria*, No. 02-9361, from a discovery order of the United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge*); and (3) No. 02-3087, a petition for writ of mandamus filed by several defendants in *Whiteman v. Austria* to compel the United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge*) to decide a motion to dismiss. The consolidated appeals present the questions, *inter alia*, whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of foreign governments for actions preceding the FSIA's enactment.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and order of the District Courts be and hereby are VACATED AND REMANDED, and the petition for writ of mandamus be and hereby is DENIED.

Plaintiffs in these consolidated matters are Jews (and their heirs and successors) who seek relief from abuses and deprivations allegedly effected by defendant states and their instrumentalities during and subsequent to World War II.

Plaintiffs in *Garb v. Poland*, No. 02-7844, are Jewish former citizens of Poland who claim that the Polish government wrongfully confiscated their land following World War II pursuant to an official post-war policy encouraging the migration of surviving Jews through the dispossession of Jewish property. Plaintiffs argue that their claims are authorized by two exceptions to sovereign immunity under the FSIA: the "commercial activity" exception, 28 U.S.C. § 1605(a)(2), and the "takings" exception, 28 U.S.C.

§ 1605(a)(3). The District Court granted defendants' motion to dismiss with respect to both claimed exceptions. *See Garb v. Poland*, 207 F. Supp. 2d 16, 33 (E.D.N.Y. 2002). Plaintiffs appeal the judgment of the District Court.

In *Whiteman v. Austria*, Nos. 02-9361 and 02-3087, plaintiffs are present and former Jewish citizens and residents of Austria who lost property under the Nazi regime in Austria from 1938 until 1945. They allege the extensive involvement of defendants-appellants in the confiscation and continued ownership of specific property, including works of art recently offered for auction in the United States. Plaintiffs argue that their claims are authorized under exceptions to the FSIA for "commercial activity," 28 U.S.C. § 1605(a)(2), "takings," 28 U.S.C. § 1605(a)(3), and waiver, 28 U.S.C. § 1605(a)(1). The District Court ordered the parties to engage in limited discovery on the threshold question of jurisdiction. *Whiteman v. Austria*, 00 Civ. 8006, slip op. at 5 (S.D.N.Y. June 10, 2002). The District Court entered a further order denying defendants' application that the Court decide a motion to dismiss prior to requiring them to undergo jurisdictional discovery. *Whiteman v. Austria*, No. 00 Civ. 8006, 2002 WL 31368236, at *8 (S.D.N.Y. Oct. 21, 2002). Defendants appealed the discovery order, No. 02-9361, then filed a petition for writ of mandamus to compel the District Court to decide their motion to dismiss, No. 02-3087.

Each of the instant cases raises the threshold questions whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of sovereign states for conduct occurring prior to the statute's enactment.

Another panel of this Court recently held in *Abrams v. Société Nationale Des Chemins De Fer Francais*, 332 F.3d 173 (2d Cir. 2003), that whether the FSIA applies retroactively in a particular case depends on whether such

application would have an impermissible "retroactive effect"—that is, whether applying the FSIA would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 180-81 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (internal quotation marks omitted)). This determination requires "a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 185 (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted)). The *Abrams* Court therefore concluded that whether or not the FSIA applied retroactively to alleged offenses that occurred prior to the statute's enactment depended on whether the plaintiffs in a particular case "could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment." *Id.* at 186. Such a determination requires the District Court to conduct a factual inquiry into the sovereign immunity enjoyed by the particular state—in *Abrams*, France; in the instant cases, Poland and Austria—prior to the enactment of the FSIA. *See id* at 186-87.

As our Court recognized in *Abrams*, the general history of United States policy on sovereign immunity is well established. *See id.* at 176-78. Judicial determinations of jurisdiction over sovereign states prior to the FSIA "usually deferred to the decision of the executive" regarding sovereign immunity, which was often expressed in the form of a "suggestion of immunity" filed by the Department of Justice at the request of the Department of State. *Id.* at 176-77. In this manner, "the executive branch played a prominent role in deciding whether a foreign sovereign was immune from suit in American courts." *Id.* at 176. "Prior to 1952, the United States adhered to the absolute theory of foreign sovereign immunity," but that year the Department of State "announced [a] formal change of policy" to the "restrictive theory of

sovereign immunity." *Id.* at 177. Under the new theory, sovereign states retained immunity from claims challenging their "governmental activities," but they no longer enjoyed immunity in United States courts from "claims arising out of [their] commercial activities." *Id.*

In *Abrams* the Court found that this general history of sovereign immunity was insufficient to support a factual determination of the legitimate expectations of a corporation wholly owned by the French government with respect to sovereign immunity, given the "prominent role" of case-by-case recommendations from the Department of State in sovereign immunity determinations prior to the passage of the FSIA. *See id.* at 176, 186-88. Accordingly, the Court remanded to allow the District Court to undertake a factual inquiry into the Department of State's position prior to the FSIA on sovereign immunity for such an entity. *See id.* at 188.

Faced with this development in the law of the Circuit since we heard oral argument in these matters, we remand for determinations of the Department of State's policy prior to FSIA with respect to sovereign immunity for Poland and Austria in the circumstances presented in each of the instant cases. We note that on remand there exists the possibility that specific evidence of the Department of State's position with respect to a particular country during a given period of time and in the circumstances presented may not exist, and thus that we may generally be forced to rely for such factual determinations on the overarching policies of the Department of State prior to the FSIA, which we acknowledged in *Abrams*. *See id.* at 177 (outlining Department of State policy prior to the FSIA, particularly the Department's "formal change of policy" in 1952 from the "absolute theory" of sovereign immunity to the "restrictive theory" of sovereign immunity). Before so relying, however, we remand to give the parties the opportunity to present particular evidence

relevant to the Department of State's position on the sovereign immunity of the nation whose conduct is in question in their particular cases. We direct the District Courts to invite the participation of the Department of State in developing a record to support their determinations.[1]

Finally, although we remand these cases to two different District Courts, we direct those Courts to coordinate their proceedings as much as possible, insofar as such coordination may avoid duplication of judicial proceedings, hearings, and other efforts by counsel, and otherwise preserve scarce judicial and other resources. We also direct the District Courts to coordinate their proceedings temporally to the extent possible, in order to allow for the continued consolidation of these cases on any future appeals.

For the foregoing reasons, (i) the June 26, 2002 judgment in *Garb v. Poland* entered by the United States District Court for the Eastern District of New York is VACATED; the discovery order in *Whiteman v. Austria* of the United States District Court for the Southern District of New York is VACATED; the petition by defendants-appellants in *Whiteman v. Austria* for writ of mandamus, No. 02-3087, is DENIED; and the causes are REMANDED for further proceedings consistent with this order.

For the Court,

Roseann B. MacKechnie, Clerk

by /s/ Lucille Carr

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[1] We caution the District Courts that the necessary factual inquiry should be conducted with appropriate attention to separation-of-powers concerns, inasmuch as the conduct of foreign relations is delegated to the political branches, *see generally Am. Ins. Ass'n v. Garamendi*, 123 S.Ct. 2374, 2386 (2003), and the adjudication of claims that risk significant interference with foreign relations policy may raise justiciability concerns, *see Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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00 Civ. 8006 (SWK)

ORDER

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZI URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FURST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPPBAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL AND ROBERT KLEIN,

Plaintiffs,

-against-

FEDERAL REPUBLIC OF AUSTRIA, VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, DOROTHEUM GMBH A/K/A DOROTHEUM AUKTIONS-, VERSATZ- UND BANKGESELL-SCHAFT MBH, BOHLER UDDEHOLM AG, OMV AG, OSTERREICHISCHE INUSTRIEHOLDING AG, RAIFFEISEN ZENTRALBANK OSTERREICH AG, STEYR-DAIMLER-PUCH AG A/K/A STEYR DAIMLER PUCH SPEZIALFAHRZEUG AG A/K/A STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG AND AUSTRIAN DOE CORPORATIONS 1 TO 100,

Defendants.

SHIRLEY WOHL KRAM, U.S.D.J.

On September 10, 2001, the Federal Republic of Austria ("Austria"), Osterreichische Industrieholding AG ("OIAG") and Dorotheum GmbH ("Dorotheum") jointly filed a motion to dismiss the above-captioned matter for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). On the same day, Austria, OIAG, Dorotheum and the remaining Defendants jointly filed a companion omnibus motion to dismiss arguing that (1) the Court should abstain from deciding this case on the grounds of international comity; (2) the complaint should be dismissed on the grounds of the political question doctrine; (3) the Court lacks personal jurisdiction over each Defendant; (4) Plaintiffs' claims are time-barred; (5) Plaintiffs have no private right of action under international law; and (6) the complaint should be dismissed on the grounds of *forum non conveniens*. After resolving the threshold issue of jurisdiction, the Court, if necessary, will address Defendants' remaining motions. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998); see also Bigio v. Coca-Cola Co., 239 F.3d 440, 454 (2d Cir. 2001) (holding that the comity doctrine is not jurisdictional); 767 Third Avenue Associates v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152, 163-64 (2d Cir. 2000) (holding that the political question doctrine is not jurisdictional).

Austria, OIAG and Dorotheum contend that they are entitled to absolute immunity because the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1601, et seq., may not be applied retroactively to events occurring prior to 1952. See Carl Marks & Co. v. Union of Soviet Socialist Republics, 841 F.2d 26 (2d Cir. 1988). In opposition, Plaintiffs assert that in light of the Supreme Court's decision in Landgraf v. USI Film Products, 511 U.S. 244 (1994), the continued viability of Carl Marks is in doubt, thus allowing the FSIA to be applied retroactively to such events. See Abrams v.

Societe Nationale Des Chemins De Fer Francais, 175 F.Supp. 2d 423, 434 (E.D.N.Y. 2001). The Court, however, need not decide whether the FSIA can be applied retroactively to events predating 1952 or the continued viability of Carl Marks. The complaint, in addition to alleging wrongful pre-1952 conduct, also alleges that Austria, OIAG and Dorotheum engaged in wrongful post-1952 conduct, which permits the Court to apply the FSIA to the instant action. See First Amended Complaint ¶¶ 16-18, 24

Austria, OIAG and Dorotheum next contend that even if the FSIA is applied retroactively, they are still entitled to sovereign immunity. In actions against a foreign state, it is well settled that the FSIA provides the sole basis for the subject matter jurisdiction of United States courts. Transatlantic Shiffahrtskontor v. Shanghai Foreign Trade Corp., 204 F.3d 384, 388 (2d Cir. 2000) (citing Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993); see also Filus v. Lot Polish Airlines, 907 F.2d 1328, 1332 (2d Cir. 1990) (holding that the FSIA also confers personal jurisdiction over a foreign state). The term "foreign state" includes any agency or instrumentality of a foreign state. See 28 U.S.C. §§ 1603(a), (b). Under the FSIA, "a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks jurisdiction over a claim against a foreign state." Nelson, 507 U.S. at 355 (internal citation omitted). Plaintiffs do not dispute that Austria, OIAG and Dorotheum are foreign states for purposes of the FSIA. Instead, Plaintiffs invoke two exceptions of the FSIA to establish subject matter jurisdiction, the expropriation exception, 28 U.S.C. § 1605(a)(3), and the commercial activity exception, 28 U.S.C. § 1605(a)(2).

"Once the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with evidence showing that, under exceptions to the FSIA, immunity should not be granted, although the ultimate burden of persuasion remains with the alleged foreign

sovereign." Cabiri v. Government of the Republic of Ghana, 165 F.3d 193, 196 (2d Cir. 1999)(internal quotation omitted). In response to Austria, OIAG and Dorotheum's assertion of sovereign immunity, Plaintiffs request that they be allowed to conduct jurisdictional discovery in order to determine the applicability of either of the two exceptions to the FSIA. In First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172 (2d Cir. 1998), the Second Circuit held that when a district court determines whether a plaintiff should be allowed to conduct jurisdictional discovery, "[s]uch considerations require a delicate balancing between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery." Id. at 176 (internal quotation and citation omitted). Thus, "a plaintiff may be allowed limited discovery with respect to the jurisdictional issue; but until she has shown a reasonable basis for assuming jurisdiction, she is not entitled to any other discovery." Id. (quoting Filus v. Lot Polish Airlines, 907 F.2d 1328, 1332 (2d Cir. 1990)); see also Reiss v. Societe Centrale Du Groupe Des Assurances Nationales, 235 F.3d 738, 748 (2d Cir. 2000). Therefore, it is hereby

ORDERED that the parties engage in discovery to determine whether the Court has both subject matter jurisdiction and personal jurisdiction over each defendant in this case. It is further

ORDERED that the parties also engage in discovery to assist the Court in its determination of whether the complaint should be dismissed on the grounds of *forum non convenienes*, should the Court decide it has jurisdiction over this matter. It is further

ORDERED that pursuant to Federal Rule of Civil Procedure 53(a), the Court appoints David H. Pikus, Esq., of the law firm of Bressler, Amery & Ross, Counsellors at Law, 17 State Street, New York, New York 10004, to serve as

Special Master for the supervision of discovery in this action. Counsel for the parties are directed to submit all questions and disputes regarding discovery to Special Master Pikus. Special Master Pikus will contact the parties in order to schedule the first meeting. It is further

ORDERED that Special Master Pikus shall receive $300.00 an hour plus expenses as compensation. This expense shall be shared equally by the parties. Finally, it is further

ORDERED that any party objecting to the appointment of Special Master Pikus file and serve any objection no later than ten (10) days from receipt of this Order.

SO ORDERED.

/s/ Shirley Wohl Kram
SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
June 5, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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00 Civ. 8006 (SWK)
OPINION AND ORDER

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZI URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FURST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPPBAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL and ROBERT KLEIN,

Plaintiffs,

-against-

FEDERAL REPUBLIC OF AUSTRIA, VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, DOROTHEUM GMBH A/K/A DOROTHEUM AUKTIONS-, VERSATZ-UND BANKGESELLSCHAFT MBH, BOHLER UDDEHOLM AG, OMV AG, OSTERREICHISCHE INUSTRIEHOLDING AG, RAIFFEISEN ZENTRALBANK OSTERREICH AG, STEYR-DAIMLER-PUCH AG A/K/A STEYR DAIMLER PUCH SPEZIALFAHRZEUGH AG A/K/A STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG and AUSTRIAN DOE CORPORATIONS 1 TO 100,

Defendants.

SHIRLEY WOHL KRAM, U.S.D.J.

Defendants move, pursuant to Federal Rule of Civil Procedure 59(e) and Local Civil Rule 6.3, for reconsideration of the Court's Order dated June 5, 2002 (the "June 5 Order"), which ordered limited jurisdictional discovery, and the appointment of David H. Pikus, Esq., to serve as Special Master for the supervision of discovery. Defendants originally moved to dismiss this case on numerous grounds. In support of their motion for reconsideration, defendants make six arguments: (1) the political question doctrine can be decided as a threshold issue of subject matter jurisdiction; (2) plaintiffs must make a *prima facie* showing of personal jurisdiction over defendants before the Court may order jurisdictional discovery; (3) international comity concerns must be discussed before discovery may proceed under the Federal Rules of Civil Procedure; (4) defendants' due process rights were overlooked; (5) discovery in regards to the doctrine of *forum non conveniens* should be stayed; and (6) the appointment of a Special Master to supervise discovery is unnecessary. For the reasons set forth below, the motion is granted in part and denied in part.

DISCUSSION

I. Legal Standard

"A motion for reconsideration should be granted only where the moving party demonstrates that the Court has overlooked factual matters or controlling decisions that were presented to it on the underlying motion." Adiel v. The Pharmacy Fund, Inc., No. 00 Civ. 3273, 2000 WL 1634381, at *1 (S.D.N.Y. Oct. 30, 2000); see also Local Civil Rule 6.3; Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). This standard is narrowly construed against the moving party to "dissuade repetitive arguments on issues that have already been considered fully by the court." Caleb & Co. v. E.I. DuPont De Nemours & Co., 624 F. Supp. 747, 748

(S.D.N.Y. 1985). Furthermore, the moving party may not "advance new facts, issues or arguments not previously presented to the Court." Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Maryland, 768 F. Supp. 115, 116 (S.D.N.Y. 1991). The decision to grant or deny the motion is within the sound discretion of the Court. See Devlin v. Transp. Communications Int'l Union, 175 F.3d 121, 132 (2d Cir. 1999) (citation omitted).

II. Subject Matter Jurisdiction

Defendants contend that the issue of the political question doctrine, which is a claim of non-justiciability, can be decided as a threshold question, just like subject matter jurisdiction. In the June 5 Order, the Court stated that the political question doctrine is not a jurisdictional issue. See June 5 Order at 2 (citing 767 Third Avenue Associates v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152, 163-64 (2d Cir. 2000). The Court also indicated that it would determine whether defendants the Federal Republic of Austria ("Austria"), Österreichische Industrieholding AG ("OIAG") and Dorotheum GmbH ("Dorotheum") are immune from the jurisdiction of United States courts pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1601-11. See June 5 Order at 2-5.

The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." Saudi Arabia v. Nelson, 507 U.S. 349, 355, 113 S. Ct. 1471 (1993). Defendants Austria, OIAG and Dorotheum are foreign states for purposes of the FSIA. In actions involving the FSIA, the Supreme Court mandates that a district court "inquire at the 'threshold of every action' against a foreign state whether the exception to sovereign immunity that the plaintiff alleges permits the exercise of federal jurisdiction." Robinson v. Gov't of Malaysia, 269 F.3d 133, 139 (2d Cir. 2001) (quoting Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493, 103 S. Ct. 1962 (1983)).

In arguing that the more complicated jurisdictional issues posed by the FSIA may be avoided by determining whether this case should be dismissed on the basis of the political question doctrine, defendants request that the Court exercise subject matter jurisdiction over Austria, OIAG and Dorotheum. "The political question doctrine holds that a federal court *having jurisdiction over a dispute* should decline to adjudicate it on the ground that the case raises questions which should be addressed by the political branches of government." Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 483 (D.N.J. 1999)(citing Baker v. Carr, 369 U.S. 186, 210, 82 S. Ct. 691 (1962)) (emphasis added).

However, not one of the Supreme Court or Second Circuit cases cited in either of defendants' memoranda involve a factual setting where a court bypassed the FSIA and decided a case on the basis of the political question doctrine when a defendant asserted both theories as a basis for dismissal. Defendants have therefore failed to demonstrate that the Court misapprehended a controlling decision. See Adiel, 2000 WL 1634381 at *1. Accordingly, this part of defendants' motion is denied.

III. Personal Jurisdiction

Defendants contend that plaintiffs are not entitled to jurisdictional discovery from defendants Raiffeisen Zentralbank Österreich AG ("Raiffeisen"), Voest-Alpine Stahl AG ("Voest"), VA Technologie AG ("VA Tech"), Böhler Uddeholm ("Bohler"), OMV Aktiengesellschaft ("OMV"), and Magna Steyr Investments SA ("Magna Steyr") (collectively, the "Corporate Defendants"). Defendants argue plaintiffs fail to set forth a *prima facie* showing of personal jurisdiction over the Corporate Defendants, and therefore jurisdictional discovery is unnecessary.

A. Legal Standard

A plaintiff bears the ultimate burden of establishing jurisdiction over a defendant by a preponderance of the evidence. See Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985). "District courts are afforded considerable procedural leeway in deciding" motions to dismiss for lack of personal jurisdiction, Credit Lyonnais Sec. (USA), Inc. v. Alcantara, 183 F.3d 151, 153 (2d Cir. 1999), and the nature of "the plaintiff's obligation varies depending on the procedural posture of the litigation." Ball v. Metallergie Hoboken-Overpet, S.A., 902 F.2d 194, 197 (2d Cir. 1990).

"However, when a Rule 12(b)(2) motion is brought at this stage--before substantial discovery and without an evidentiary hearing--plaintiffs need make only a prima facie showing that personal jurisdiction exists." Schenker v. Assicurazioni Generali S.p.A., Consol., No. 98 Civ. 9186, 2002 WL 1560788, *1 (S.D.N.Y. July 15, 2002)(citations omitted). In doing so, "plaintiffs may rely entirely on allegations of fact, and they will prevail even if the moving party makes contrary allegations which controvert their prima facie case." Cornell v. Assicurazioni Generali S.p.A. et al., Nos. 98 Civ. 9186, 97 Civ. 2262, 2000 WL 284222, *1 (S.D.N.Y. Mar. 16, 2000)(citations omitted). A court may also consider materials outside the pleadings. See Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 208 (2d Cir. 2001). In reviewing a motion to dismiss for lack of personal jurisdiction, a court must view all of the pleadings in the light most favorable to plaintiffs, resolving any doubts in plaintiffs favor. See Hoffritz, 763 F.2d at 57.

In this action, personal jurisdiction over the Corporate Defendants "is determined by reference to the law of the jurisdiction in which the court sits." Id. If the exercise of jurisdiction would be valid under New York law, a court must then determine whether such exercise is consistent with the

Due Process Clause of the Fifth Amendment. See Bensusan Rest. Corp. v. King, 126 F.3d 25, 27 (2d Cir. 1997).

B. New York Personal Jurisdiction Law

Plaintiffs claim that the Court may exercise personal jurisdiction over the Corporate Defendants pursuant to New York Civil Practice Law and Rules ("CPLR") § 301. Under CPLR § 301, a New York court may exercise general personal jurisdiction over a foreign corporation if it is 'doing business' in New York. See McGowan v. Smith, 52 N.Y.2d 268, 272 (1981). Under this test, "a foreign corporation is amenable to suit in New York if it is 'engaged in such continuous and systematic course of 'doing business' here as to warrant a finding of its 'presence' in this jurisdiction." Aerotel Ltd. v. Sprint Corp., 100 F. Supp. 2d 189, 191 (S.D.N.Y. 2000)(quoting Frummer v. Hilton Hotels Int'l Inc., 19 N.Y.2d 533, 536 (1967)). "Casual or occasional activity does not constitute doing business; rather, CPLR § 301 requires a showing of 'continuous, permanent, and substantial activity in New York.'" In re Ski Train Fire in Kaprun Austria on Nov. 11, 2000, 01 Civ. 6554, MDL No. 1428, 2002 WL 31106403, *3 (S.D.N.Y. Sept. 19, 2002)(quoting Landoil Res. Corp v. Alexander & Alexander, Inc., 918 F.2d 1039, 1043 (2d Cir. 1990)).

The traditional indicia of whether a foreign corporation is doing business in New York are: (1) whether the company has an office in the state; (2) whether it has any bank accounts or other property in the state; (3) whether it has a phone listing in the state; (4) whether it does public relations work there; and (5) whether it has individuals permanently located in the state to promote its interests. See Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 98 (2d Cir. 2000) (citations omitted), cert. denied, 532 U.S. 941 (2001). "The 'doing business' standard is a stringent one because a corporation which is amenable to the Court's general jurisdiction 'may be sued in New York on causes of action wholly unrelated to

acts done in New York.'" Jacobs v. Felix Bloch Erben Verlag, 160 F. Supp. 2d 722, 731 (S.D.N.Y. 2001) (quoting Ball, 902 F.2d at 198). Moreover, "conclusory non-fact-specific jurisdictional allegations are insufficient to establish even a *prima facie* showing of personal jurisdiction under § 301." Schenker, 2002 WL 1560788 at *2 (quotations and citations omitted).

1. Raiffeisen Zentralbank Österreich AG

Plaintiffs allege that Raiffeisen is doing business in New York because it has a license from the New York State Department of Banking to maintain a representative office in New York. See Amended Complaint at ¶ 89. The license, however, is "not a license to engage in the business of banking in the State of New York." Declaration of Phillippe Zimmerman, dated November 21, 2001 ("Zimmerman Decl."), Ex. 49. A foreign banking corporation with a license to maintain a representative office is able to only engage in certain limited activities in the state of New York. See N.Y. Banking Law § 221-a (McKinney 2001). Raiffeisen admits that it operates a representative office in Manhattan, and staffs it with two full-time employees. See Appendix of Declarations in Support of Defendants' Joint Motion to Dismiss, Exhibit H, Declaration of F. Dieter Beintrexler at ¶ 6. These facts demonstrate a *prima facie* showing of personal jurisdiction with regard to Raiffeisen.

The question of the extent of Raiffeisen's business activities in New York is appropriately addressed after jurisdictional discovery has occurred. See Dorfman v. Marriott Int'l Hotels, Inc., No. 99 Civ. 10496, 2001 WL 69423, *4 (S.D.N.Y. Jan. 29, 2001). Following discovery, plaintiffs will be required to establish that Raiffeisen is doing business in New York by a preponderance of the evidence. See id. The Court hereby allows plaintiffs limited discovery to ascertain whether the Court may exercise personal jurisdiction over Raiffeisen because it operates a represen-

tative office in New York pursuant to a license from the New York State Department of Banking.

2. Voest-Alpine Stahl AG

Plaintiffs allege that Voest is doing business in New York through its business relationship with Voest-Alpine Steel Corporation (USA)("Voest USA"). See Amended Complaint at ¶ 103.

Under New York law, "the presence of a subsidiary alone does not establish the parent's presence in the state." Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 184 (2d Cir. 1998)(citing Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120 (2d Cir. 1984)). To have personal jurisdiction against the foreign parent, "the subsidiary must be either an 'agent' or a 'mere department' of the foreign parent." Jazini, 148 F.3d at 184 (citing Koehler v. Bank of Bermuda Ltd., 101 F.3d 863, 865 (2d Cir. 1996)).

"To establish that a subsidiary is an agent of the parent, the plaintiff must show that the subsidiary 'does all the business which [the foreign parent] could do were it here by its own officials.'" Jazini, 148 F.3d at 184 (citing Frummer, 19 N.Y.2d at 537). "Courts have interpreted this to mean that the agent's activities in New York must be sufficiently important to the foreign [parent] that if it did not have a representative to perform them, the [parent's] own officials would undertake to perform substantially similar services." Schenker, 2002 WL 1560788 at *6 (quotation omitted).

To determine whether a subsidiary is a mere department of the foreign parent, the Court must consider four factors: (1) common ownership, which is essential; (2) financial dependency of the subsidiary on the parent; (3) the degree to which the parent interferes in the selection and assignment of the subsidiary's personnel and fails to observe corporate formalities; and (4) the degree of control that the parent

exercises over the subsidiary's marketing and operational policies. See Beech Aircraft, 751 F.2d at 120-22.

Plaintiffs refer to the website of Voest USA, which states that Voest USA "with its office in Harrison, New York--represents [Voest] in North America and serves as your local contact partner." Zimmerman Decl., Ex. 54 (emphasis in original). Additionally, the website also states that "[Voest USA] is a marketing and sales link between the members of [Voest] and its customers in North America." Id. Voest identifies Voest USA as its subsidiary, and admits having an ownership interest in it, which satisfies the first Beech factor. See Appendix of Declarations in Support of Defendants' Joint Motion to Dismiss, Exhibit H, Declaration of Dr. Hubert Possegger ¶ 14. These facts raise a legitimate questions as to whether Voest USA is either an agent or mere department of Voest, and are appropriately addressed after discovery. See Dorfman, 2001 WL 69423 at *4. Following discovery, plaintiffs will be required to establish Voest's presence in New York by a preponderance of the evidence. See id. The Court hereby allows plaintiffs limited discovery to ascertain the Court's jurisdiction over Voest through its business relationship with Voest USA.

3. VA Technologie AG

Plaintiffs allege that Va Tech is an affiliate company and shareholder of Voest. See Amended Complaint at ¶ 104. Plaintiffs assert that VA Tech's website reveals that it possesses more than a dozen affiliates in the United States, and, therefore, the Court may exercise personal jurisdiction over VA Tech. See Zimmerman Decl., Exs. 56 and 57. The website, however, does not indicate that any of the affiliates are located in New York. See id. Therefore, the Court finds that plaintiffs fail to make a *prima facie* case for the Court's exercise of personal jurisdiction over VA Tech pursuant to CPLR § 301.

4. Böhler Uddeholm

Plaintiffs allege that Bohler, because it acquired Allegheny Teledyne in 1997, is doing business in New York. See Amended Complaint at ¶ 105. According to Bohler's website, Bohler USA maintains its main sales office in Arlington Heights, Illinois, and service centers in .Chicago, Cleveland, Boston and Los Angeles. See Zimmerman Decl., Ex. 59. The website, however, does not provide information suggesting that either Bohler or Bohler USA are doing business in the state of New York. Additionally, plaintiffs' complaint fails to address the nature of the business relationship between Bohler and Bohler USA. Therefore, the Court finds that plaintiffs fail to make a *prima facie* showing of personal jurisdiction over Bohler.

5. OMV Aktiengesellschaft

Plaintiffs offer three factual scenarios to support their assertion that OMV is doing business in New York. First, plaintiffs allege that the Court may exercise personal jurisdiction over OMV because it operates Agrolinz Inc in the United States. This argument fails. Plaintiffs do not allege any facts establishing that Agrolinz Inc. is doing business in the state of New York.

Plaintiffs further allege that the Court may exercise personal jurisdiction over OMV because it sells American Depository Receipts ("ADR") to U.S. investors and has designated a New York based depository for such ADR's. This argument also fails. When a foreign corporation's securities "are traded in the United States in the form of ADR's . . . that trading still do[es] not amount to continuous and systematic general business contacts sufficient to warrant the exercise of" jurisdiction pursuant to CPLR § 301. Dardana Ltd. v. A.O. Yuganskneftegaz, No. 00 Civ. 4633, 2001 WL 1131987, *4 (S.D.N.Y. Sept. 24, 2001). Additionally, a foreign corporation "is not 'doing business' in

New York merely by taking ancillary steps in support of its listing on a New York exchange," Wiwa, 226 F.3d at 97, such as "designating a depository for [its] shares." Dardana Ltd., 2001 WL 1131987 at *4.

Finally, plaintiffs assert that OMV is doing business in New York because its website identifies Golin-Harris Ludgate New York ("Golin-Harris") as part of OMV. See Zimmerman Decl., Ex. 60. This argument fails. Beyond providing information for contacting Golin-Harris, which is located in Manhattan, the website does not explain what business Golin-Harris engages in on behalf of OMV or the nature of the business relationship between the two companies. See id. Therefore, the Court finds that plaintiffs fail to make a *prima facie* showing of personal jurisdiction over OMV.

6. Magna Steyr Investments SA

Plaintiffs allege that Magna Steyr is a manufacturer doing business in New York. See Amended Complaint at ¶ 92. According to plaintiffs, Magna Steyr is the corporate successor to Steyr-Daimler-Puch AG and manufactures automotive parts and assembles "certain Mercedes vehicles to the Jeep Cherokee." Id. Plaintiffs, however, fail to show that Magna Steyr has a business presence in New York.

Plaintiffs also claim that the Court may assert jurisdiction over Magna Steyr because Magna Entertainment Corporation ("MEC") is doing business in New York. Id. at ¶ 93. This argument is based upon the corporate relationship between three companies: Magna Steyr, MEC and Magna International. See Defendants' Reply Memorandum of Law, dated December 20, 2001, at 46. Magna International is the corporate parent, Magna Steyr is a subsidiary of Magna International, and MEC is another subsidiary of Magna International. Id. MEC has no direct corporate ties with Magna Steyr, and Magna Steyr is the only company named a

defendant in the complaint. Id. According to plaintiffs, MEC "is in the process of attempting to purchase New York's Off Track Betting parlors." Amended Complaint at ¶ 93. In effect, plaintiffs assert that because MEC is doing business in New York, the Court may exercise jurisdiction over Magna International, MEC's corporate parent, which, in turn, allows the Court to exercise jurisdiction over Magna Steyr because it is a subsidiary of Magna International. However, plaintiffs cite no relevant New York law that would allow the Court to exercise jurisdiction based upon this corporate structure. Therefore, the Court finds that plaintiffs fail to state a *prima facie* case for the Court's exercise personal jurisdiction over Magna Steyr.

C. Personal Jurisdiction Based On New York's Insurance Law

Plaintiffs assert that the Court may exercise personal jurisdiction over the Corporate Defendants pursuant to the New York State Holocaust Victims Insurance Act of 1998 (the "Victims Act"). See N.Y. Ins. Law §§ 2701-11 (McKinney 2000). The Victims Act requires certain conduct on the part of "any insurer organized, registered, licensed or accredited to do an insurance business in this state." Id. at § 2703(a). Plaintiffs, however, fail to provide the Court with facts indicating that any defendant is an insurer organized, registered, licensed or accredited to do an insurance business in New York. Therefore, the Victims Act does not provide a basis for the Court to exercise personal jurisdiction over the Corporate Defendants.

The Court finds that plaintiffs failed to make a *prima facie* showing of personal jurisdiction pursuant to either CPLR § 301 or the Victims Act over VA Tech, Bohler, OMV and Magna Steyr. Accordingly, this case is dismissed with respect to VA Tech, Bohler, OMV and Magna Steyr.

IV. International Comity Concerns and Jurisdictional Discovery

Defendants contend that before ordering jurisdictional discovery against foreign defendants, international comity concerns obligate the Court to analyze how that discovery should proceed. The Court already performed such an international comity analysis in its June 5 Order, explaining that

> In First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172 (2d Cir. 1998), the Second Circuit held that when a district court determines whether a plaintiff should be allowed to conduct jurisdictional discovery, "[s]uch considerations require a delicate balancing between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery." Id. at 176 (internal quotation and citation omitted). Thus, "a plaintiff may be allowed limited discovery with respect to the jurisdictional issue; but until she has shown a reasonable basis for assuming jurisdiction, she is not entitled to any other discovery." Id. (quoting Filus v. Lot Polish Airlines, 907 F.2d 1328, 1332 (2d Cir. 1990))

June 5, 2002 Order.

Additionally, conducting discovery pursuant to the Federal Rules of Civil Procedure is proper when a defendant is a foreign litigant. See Bodner v. Paribas, 202 F.R.D. 370, 374 (E.D.N.Y. 2000)(stating that "the Supreme Court expressly held that the Hague Convention did not preempt the Federal Rules with respect to discovery from foreign litigants")(citing Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 539-40, 207 S. Ct. 2542 (1987).

The Court recognized the international comity concerns implicated by such discovery, and therefore limited that discovery to a determination of whether jurisdiction exists

over defendants. Accordingly, this part of defendants' motion is denied.

V. Defendants' Due Process Rights

Defendants contend that the June 5 Order overlooked their due process rights because the Court did not address their request to file a motion for a protective order. Defendants, in a letter dated March 14, 2002, informed the Court that they viewed plaintiffs' discovery requests as broad and asked the Court to stay discovery until the Court issued a ruling on the pending motions to dismiss, especially since those motions raised threshold legal issues. See Letter from Konrad L. Cailteux, Esq., to Hon. Shirley Wohl Kram, dated March 14, 2002. The June 5 Order addressed defendants' concerns because it limited the scope of discovery to the threshold issue of jurisdiction. See June 5 Order at 5. During the production of jurisdictional discovery, if defendants, upon reviewing plaintiffs' discovery requests, object to a specific item requested, they may move for appropriate relief at that time.

Defendants also contend that the Court made certain statements during the pre-trial conference held on May 22, 2002, and then issued an order which was inconsistent with those statements. Specifically, in response to defendants' statement that "the way that we can move this case along most effectively is for your Honor to decide the motions . . .," the Court indicated that deciding the motions was "the only route to go." May 22, 2002 Tr. at 10. Following the pre-trial conference, the Court, in its discretion and upon further review of the motion papers and supporting memoranda, determined that jurisdictional discovery was necessary for it to decide the threshold legal challenges presented by defendants.

Therefore, the Court finds that defendants' due process rights were not overlooked when they were ordered to engage

in limited discovery. Accordingly, this part of defendants' motion is denied.

VI. *Forum Non Coveniens* Discovery

Defendants assert that the June 5 Order is internally inconsistent because it first stated that discovery would be limited to determining whether the Court has jurisdiction over defendants but later stated that the parties should also engage in *forum non conveniens* discovery. "The doctrine of *forum non conveniens* permits a court to dismiss a claim even if the court is a *permissible* venue with proper jurisdiction over the claim." PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc., 138 F.3d 65, 73 (2d Cir. 1998)(emphasis in original). In this action, the Court has not yet determined whether it has proper jurisdiction over defendants. Therefore, the Court finds that defendants should not be obligated to provide discovery regarding the doctrine of *forum non conveniens*. Accordingly, this part of defendants' motion is granted, and the portion of the June 5 Order ordering "that the parties also engage in discovery to assist the Court in its determination of whether the complaint should be dismissed on the grounds of *forum non conveniens*, should the Court decide it has jurisdiction over this matter" is hereby deleted from the June 5 Order.[1]

VII. Leave to Amend

Federal Rule of Civil Procedure 15(a) provides, in part, that once a responsive pleading has been served, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely

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[1] The Court notes that the original decision to conduct such discovery was done with efficiency in mind so that the parties would be spared the burden and expense of re-conducting discovery should the Court conclude that it has jurisdiction over this matter. This case involves a matter of the utmost importance to the survivors of the Holocaust, many of whom have been waiting over sixty years for redress.

given when justice so requires." Fed. R. Civ. P. 15(a). The decision to grant or deny leave to amend lies within the Court's discretion. See Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227 (1962). Plaintiffs are granted leave to amend the Amended Complaint as to their claims against VA Tech, Bohler, OMV and Magna Steyr. Any such amendment must be filed within 21 days of the date of entry of this Opinion and Order.

CONCLUSION

For the reasons set forth above, defendants' motion for reconsideration is granted in part and denied in part. The Court grants the motions filed by VA Tech, Bohler, OMV and Magna Steyr to dismiss this case for lack of personal jurisdiction. Plaintiffs may amend the Amended Complaint, which must be filed within 21 days of the date of entry of this Opinion and Order. The parties are hereby ordered to conduct jurisdictional discovery, under the supervision of the Court, limited to determining whether: (1) the Court may exercise subject matter jurisdiction over Austria, OIAG and Dorotheum pursuant to the FSIA; (2) the Court may exercise personal jurisdiction over Raiffeisen through its operation of a representative office in New York; and (3) the Court may exercise personal jurisdiction over Voest as a result of its business relationship with Voest USA. Jurisdictional discovery shall be completed by January 8, 2003. Furthermore, the parties are ordered to appear at a pre-trial conference on January 15, 2003.

SO ORDERED.

/s/ Shirley Wohl Kram
SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
October 9, 2002

UNITED STATES CODE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

UNITED STATES CODE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

UNITED STATES CODE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section

or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or

cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.—

(1) In general.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 00-8006 (SWK)

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FURST, ERNST B. RIVIN-REISENFELD, LIZZY RAPPBAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, AND ROBERT KLEIN,

Plaintiffs,

v.

FEDERAL REPUBLIC OF AUSTRIA, VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, DOROTHEUM GMBH A/K/A DOROTHEUM AUKTIONS-, VERSATZ- UND BANKGESELL-
SCHAFT MBH, BOHLER UDDEHOLM AG, OMV AG, OSTERREICHISCHE INDUSTRIEHOLDING AG, RAIFFEISEN ZENTRALBANK OSTERREICH AG, STEYR-DAIMLER-PUCH AG A/K/A STEYR-DAIMLER-PUCH SPEZIALFAHRZEUG AG A/K/A STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AND AUSTRIAN DOE CORPORATIONS 1 TO 100,

Defendants.

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

The United States of America ("United States") respectfully submits this Statement of Interest and attached Joint Statement and Exchange of Notes for the purpose of attending to the interests of the United States in connection with these actions.[1/] Through this Statement, the United States expresses both its foreign policy interests with regard to the Austrian General Settlement Fund ("GSF"), which was created to provide a potential remedy for all victims with Nazi-era claims against Austria and/or Austrian companies not covered by the Austrian Fund "Reconciliation, Peace and Cooperation" ("Reconciliation Fund"), excluding those with claims for *in rem* restitution of works of art, and the public interest in the cooperative resolution of claims for compensation arising out of the Nazi era and World War II. This Statement articulates the interest of the United States in dismissal of these claims on any valid legal ground because of the United States' strong interests in the success of the GSF, and because such success is predicated on the dismissal of the property/aryanization claims in the case before this Court. This Statement further sets forth the United States' opposition to plaintiffs' challenge to the sovereign immunity of Austria.

BACKGROUND

1. United States Policy on Holocaust Claims

The policy of the United States Government with regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era is motivated by the twin concerns of justice and urgency. See Declaration of Stuart E.

[1/] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 517.

Eizenstat ("Eizenstat Decl.") ¶¶ 3, 30 (attached hereto as Ex. 1). No price can be put on the suffering that the victims of Nazi-era atrocities endured. Nevertheless, the moral imperative remains to provide some measure of justice to the victims of the Holocaust, and to do so in their remaining lifetimes. Id. ¶ 3. Today, 56 years after the Holocaust, the survivors are elderly and are dying at an accelerated rate. Id. ¶ 30. The United States believes, therefore, that concerned parties, foreign governments, and non-governmental organizations should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation, rather than subject victims and their families to the prolonged uncertainty and delay that accompany litigation. Id. ¶¶ 3, 30.

The creation of the GSF, in favor of which the defendants now seek to have the remaining claims in this litigation dismissed, is an example of the successful implementation of this United States policy. Id. ¶¶ 29-31. This Statement sets forth the history of the negotiations that led to the GSF's creation, a description of the benefits available through the GSF and how the GSF will operate, and the basis for the United States' conclusion that it would be in the United States' interests for the GSF to be the exclusive remedy for all Nazi-era claims against Austria and/or Austrian companies, excluding claims covered by the Fund "Reconciliation, Peace and Cooperation," and further excluding claims for *in rem* restitution of works of art.

2. History of the Negotiations Leading to Creation of the GSF

In February 2000, the Austrian Federal Government asked former Deputy Treasury Secretary Stuart E. Eizenstat to help facilitate a resolution of class action lawsuits filed in U.S. courts arising from slave and forced labor on the territory of the present-day Republic of Austria during the Nazi era. Id. ¶¶ 1, 5. During the subsequent nine months, Eizenstat co-chaired a series of formal and informal discussions among

representatives of the victims, including plaintiffs' attorneys, and the Austrian Federal Government on a proposed initiative to establish a fund to make payments to Nazi-era victims of slave and forced labor on the territory of the present-day Republic of Austria. Id. ¶ 5. The parties' intent was to model this fund on the German Foundation, "Remembrance, Responsibility, and the Future" (the "German Foundation"), which the German Government had created after a year and a half of negotiations, also co-chaired by Deputy Treasury Secretary Eizenstat, among victims' representatives, lawyers for German companies, and the German Government. See id.

The parties to these negotiations anticipated that, at the conclusion of an agreement concerning the establishment of a fund for Nazi-era forced and slave laborers who worked on the territory of the present-day Republic of Austria, the parties would commence negotiations concerning the establishment of a similar fund for Holocaust victims with claims against Austria and/or Austrian companies concerning the aryanization, theft, or destruction of property during this same time period. Id. ¶ 6. In early October 2000, Austria committed $150 million to be paid on an expedited, per-capita basis to survivors of the Holocaust originating from or living in Austria for claims for apartment and small business leases, household property, and personal effects, excluding *in rem* claims for works of art and potential claims against the Dorotheum.[2/] Id. ¶ 7. Austria's commitment with regard to these claims is set forth in the Framework Concerning Austrian Negotiations Regarding Austrian Nazi Era Property/ Aryanization Issues ("Framework") (attached hereto as Ex. 4). Id.

[2/] The Dorotheum is an auction house in Vienna through which property ariyanized during the National Socialist Era and World War II was sold.

On October 24, 2000, the parties to the negotiations gathered in Vienna to sign a Joint Statement concluding the negotiations, and expressing their support for the Reconciliation Fund as the exclusive remedy for all Nazi-era forced and slave labor claims against Austria and/or Austrian companies on the territory of the present-day Republic of Austria. Id. ¶ 8. Simultaneously, the United States and Austria signed an Executive Agreement, in which Austria committed that the operation of the Reconciliation Fund would be governed by principles agreed by the parties to the negotiations, and the United States committed to take certain steps to assist Austria and Austrian companies in achieving "legal peace" in the United States with respect to Nazi-era forced and slave labor claims (and any other claims covered by the Reconciliation Fund). Id. The Executive Agreement entered into force by exchange of notes between the Austrian Federal Government and the United States Government on December 1, 2000. Id.

After being publicly announced earlier that day by the Chancellor of Austria, Wolfgang Schuessel, negotiations commenced in Vienna during the evening of October 24, 2000, concerning the creation of the GSF to address all Nazi-era property/aryanization claims against Austria and/or Austrian companies, and all other Nazi-era claims against Austria and/or Austrian companies not covered by the Reconciliation Fund, excluding claims for the *in rem* restitution of works of art. Id. ¶ 9. Eizenstat co-chaired these negotiations with Austrian Ambassador Ernst Sucharipa, the Austrian Special Envoy for Restitution Issues. Id. The participants in these negotiations included the United States, the Austrian Federal Government, Austrian companies, and representatives of the victims, including the Conference on Jewish Material Claims, a non-governmental organization created to negotiate for and administer compensation for Nazi-era atrocities committed against Jewish people around

the world.[3/] Id. Through these participants and the numerous plaintiffs' attorneys, the victims' interests were broadly and vigorously represented. Id.

In January 2001, Austria, Austrian companies, and the great majority of plaintiffs' attorneys agreed on two key points: that the Austrian Federal Government and Austrian companies would establish a fund, capitalized by $210 million (plus interest accruing over a two-year period) to make payments for all claims against Austria and/or Austrian companies arising out of or relating to the National Socialist Era or World War II, excluding claims for *in rem* restitution of works of art, and further excluding claims covered by the Reconciliation Fund, and that, in exchange, the plaintiffs would voluntarily dismiss all such claims filed in U.S. courts. Id. ¶ 10. The United States Government further pledged to support this effort by filing a Statement of Interest indicating its own foreign policy interests in assisting Holocaust victims on an expedited basis, and in helping achieve legal peace for Austria and Austrian companies with respect to Nazi-era property/aryanization claims (and any other claims covered by the GSF) in U.S. courts. Id.

Virtually all parties agreed on eligibility requirements and other procedures to govern the GSF's operation. Id. ¶ 11. Virtually all parties also came to agreement on levels of

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[3/] The Conference on Jewish Material Claims against Germany ("CJMC") is an umbrella organization under which various Jewish groups and organizations of Holocaust survivors are represented. Among the participating groups and organizations are the American Gathering/ Federation of Jewish Holocaust Survivors, the American Jewish Committee, the American Jewish Congress, B'nai B'rith International, the Centre of Organizations of Holocaust Survivors in Israel, the World Jewish Congress, the Central Committee of Jews from Austria in Israel, and the American Council for Equal Compensation for Nazi Victims from Austria.

capital distribution among and evidentiary standards for different varieties of property/aryanization claims. Id.

On January 17, 2001, the parties to the negotiations gathered in Washington to sign a Joint Statement concluding the negotiations, and expressing their support for the GSF as the exclusive remedy for all Nazi-era claims against Austria and/or Austrian companies, excluding claims for *in rem* restitution of works of art, and further excluding claims covered by the Reconciliation Fund. Id. ¶ 13; Joint Statement of January 17, 2001 (Eizenstat Decl. Ex. A). The agreement among the parties took effect on January 23, 2001, when the United States and Austria exchanged diplomatic notes expressing Austria's commitment that the operation of the GSF will be governed by principles the parties agreed upon during the negotiations, including the Austrian Federal Government's obligation to propose legislation establishing the GSF (including a Claims Committee and an *in rem* Arbitration Panel) and to amend various social benefits laws, and the United States' commitment to take certain steps to assist Austria and Austrian companies in achieving "legal peace" in the United States with respect to all Nazi-era claims against Austria and/or Austrian companies, excluding claims for *in rem* restitution of works of art. Id. ¶ 14; Exchange of Notes of January 23, 2001 (Eizenstat Decl. Ex. B).[4/]

On June 6, 2001, the law creating the GSF was promulgated and entered into effect. Federal Law on the Establishment of a General Settlement Fund for Victims of National Socialism and on Restitution Measures (General Settlement Fund Law), as well as on an Amendment to the General Social Security Law and the Victims Assistance Act

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[4/] The Exchange of Notes of January 23, 2001, constitutes an executive agreement between the United States Government and the Austrian Federal Government. See Exchange of Notes of January 23, 2001 (Eizenstat Decl. Ex. B).

("GSF Law") (unofficial translation attached hereto as Ex. 2). Also on June 6, 2001, the Austrian Federal Government provided the United States Government with a diplomatic note stipulating that Austria had fulfilled the obligations necessary to bring into force the agreement between the Austrian Federal Government and the United States Government concerning the GSF, which is embodied in the Exchange of Notes of January 23, 2001. Note Verbale of June 6, 2001 (attached hereto as Ex. 3).

The role played by the United States in this negotiation, like the role it played in the negotiation leading to the creation of the Reconciliation Fund, the German Foundation, and the fund established to provide payments for those who suffered losses at the hands of French banks during World War II ("French Bank Fund"), was unique. Eizenstat Decl. ¶ 15. The agreement negotiated is not a government-to-government claims settlement agreement, and the United States has not extinguished the claims of its nationals or anyone else. Id. Instead, the intent of the United States' participation was to bring together the victims' constituencies on one side and the Austrian Federal Government and Austrian companies on the other, to bring a measure of expeditious justice to the widest possible population of survivors and heirs, and to help facilitate legal peace with respect to Nazi-era property/aryanization claims against Austria and/or Austrian companies, and any other claims not covered by the Reconciliation Fund, excluding claims for *in rem* restitution for works of art. Id..

Among these parties, the United States facilitated the essential arrangement by which the Austrian side would establish a $210 million (plus interest) fund to address all Nazi-era claims against Austria and/or Austrian companies, with the exception of those claims covered by the Reconciliation Fund and claims for the *in rem* restitution of works of art, and the class action representatives in pending

United States litigation agreed to give up their Nazi-era property/aryanization claims against Austria and/or Austrian companies (and any other claims covered by the GSF), by voluntary dismissals with respect to such claims in United States courts. Id. and Exs. A and B. The United States further contributed its own commitment to advise U.S. courts of its foreign policy interests, described in detail below, in the GSF being treated as the exclusive remedy for all claims against Austria and/or Austrian companies arising out of or relating to the National Socialist Era or World War II, excluding claims for *in rem* restitution of works of art, and further excluding claims covered by the Reconciliation Fund, and, concomitantly, in such claims being dismissed. Id. The United States also committed to "take appropriate steps to oppose any challenge to the sovereign immunity of Austria with respect to any claim that maybe asserted against the Republic of Austria involving or related to the use of slave or forced labor during the National Socialist era or World War II and any other claims covered by the Fund." Id. Ex. B.

3. Benefits and Operation of the GSF

The GSF is intended to benefit victims of Nazi-era persecution, including heirs and victims' communal organizations, and will be capitalized with $ 210 million, plus interest accruing over a two-year period to begin 30 days after all claims filed as of June 30, 2001, have been dismissed and continuing until the capital of the GSF has been exhausted on approved claims. Eizenstat Decl. ¶ 17 and Ex. B, Annex A, ¶ 2; GSF Law §§ 1-2.

The GSF legislation establishes an independent three-member Claims Committee ("Committee") for all Nazi-era claims against Austria and/or Austrian companies, including claims against defunct companies and companies not subject to jurisdiction in U.S. courts, but excluding claims for *in rem* restitution of works of art, and further excluding claims covered by the Reconciliation Fund. Id. ¶ 18 and Ex. B,

Annex A, ¶ 2.a.; GSF Law § 4. The United States and Austria have each appointed one member of the Committee; these two members will then appoint a Chairperson. Id.

The GSF legislation provides that 50% of the funds allocated for distribution from the GSF will be reserved for a "claims-based" process and 50% of such funds will be reserved for an "equity-based" process. Eizenstat Decl. ¶ 19 and Ex. B, Annex A, ¶ 2.b.; GSF Law § 5. The GSF will distribute the funds allocated for the "claims-based" process on a pro-rata basis and the funds allocated for the "equity-based" process on a per-household basis.[5/] Eizenstat Decl. ¶ 19 and Ex. B, Annex A, ¶ 2.b. A claimant may submit an application to the Committee either under the "claims-based" process (which claim may include multiple properties) or under the "equity based" process. Eizenstat Decl. ¶ 19 and Ex. B, Annex A, ¶ 2.h.; GSF Law § 9. If an entire claim is rejected under the "claims-based" process, a claimant may submit an application under the "equity-based" process. Id. Claims under both the "claims-based" and the "equity-based" processes may be made for 24 months following June 6, 2001--the date the GSF law entered into force. Eizenstat Decl. ¶ 19 and Ex. B, Annex A, ¶ 2.i.; GSF Law § 8.

The GSF legislation requires the Committee to establish simplified procedures. The Committee will review all applications using relaxed standards of proof, and will make all decisions on a majority basis, except those concerning the reopening of cases that have been finally decided by an Austrian court or administrative body under Austrian restitution legislation or that have been settled after 1945, in which cases the Committee may award payments only where the Committee unanimously determines that such decision or

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[5/] Household on the present-day territory of the Republic of Austria between March 12, 1938, and May 8, 1945. Eizenstat Decl. ¶ 21 and Ex. B, Annex A, ¶ 3.

settlement constituted extreme injustice. Eizenstat Decl. ¶ 20 and Ex. B, Annex A, ¶ 2.f.-g.; GSF Law §§ 10, 15, 16.

Under the "claims-based" process, the Committee may receive claims for the following categories of property: (i) liquidated business, including licenses and other business assets; (ii) real property; (iii) bank accounts, stocks, bonds, and mortgages; (iv) moveable property not covered by the $150 million provided for in the Framework for Holocaust survivors' apartment and small business leases, household property, and personal effects; and (v) insurance policies. Eizenstat Decl. ¶ 21 and Ex. B, Annex A, ¶ 2.f.; GSF Law § 14; Framework (Ex. 4). Under the "claims-based process," the Committee may award a payment of no more than $2 million for any approved claim. Eizenstat Decl. ¶ 21 and Ex. B, Annex A, ¶ 2.f.; GSF Law § 16. The GSF provides simplified and expedited internal appeals for decisions made under the "claims-based" process. GSF Law §§ 12, 17.

Under the "equity-based" process, the Committee will make per-household payments for the categories of property covered by the "claims-based" process (using even more relaxed standards of proof than the "claims-based" process) or any Nazi-era claims not covered by the Reconciliation Fund. Eizenstat Decl. ¶ 22 and Ex. B, Annex A, ¶ 2.g.; GSF Law §§ 19-21. The Committee will award no more than one "equity-based" payment per household. Id.

The GSF legislation provides that the Committee will evaluate insurance claims under the claims-handling procedures of the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). Eizenstat Decl. ¶ 23 and Ex. B, Annex A, ¶ 2.n.; GSF Law § 18. Insurance claims will be paid on a pro-rata basis. Id. The Austrian Insurance Association will make lists of Holocaust-era policy holders publicly accessible. Id. An amount of $25 million will be allocated for payment of insurance claims out of the GSF. Id. In the event that the Committee exhausts the $25 million

allocated for insurance claims and additional claims are outstanding, the Committee may use an additional amount--up to $5 million--from the "claims-based" process to pay insurance claims. Id.

In connection with the establishment of the GSF, the Austrian Federal Government has enacted legislation establishing, funding, and authorizing a three-member Arbitration Panel ("Panel") to consider, on a case-by-case basis, the *in rem* return of publicly-owned property, including property formerly owned by Jewish communal organizations. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3; GSF Law § 23. The United States, with prior consultation with the victims' representatives, and Austria have each appointed one member of the Panel; these two members will appoint a Chairperson. Id. Potential claimants for *in rem* restitution of publicly-owned property include survivors, heirs, and victims' communal organizations. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3; GSF Law § 27. The Panel will make recommendations to the competent Austrian Federal Minister for *in rem* restitution. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3; GSF Law § 34. The competent Austrian Federal Minister is expected to approve the Panel's recommendation. Eizenstat Decl. Ex. B, Annex A, ¶3.j. As agreed to in the Exchange of Notes of January 17, 2001, see Exchange of Notes of January 23, 2001, Annex A, ¶ 3.j. (Eizenstat Decl. Ex. B), on January 31, 2001, the Austrian Parliament passed a resolution indicating its expectation that the Panel's recommendations will be approved by the competent Austrian Federal Minister, see Motion of Resolution of January 31, 2001 (unofficial translation attached hereto as Ex. 6). The United States and Austrian Federal Government will consult on a regular basis concerning the implementation of the Panel recommendations. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3.s.

Where *in rem* restitution, although merited, is not practical, the Panel may make recommendations that the claimant be awarded a comparable property. Eizenstat Decl. 24 and Ex. B, Annex A, ¶ 3.i.; GSF Law § 34.

The Panel will make its recommendations within six months of receiving any claim. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3.k.; GSF Law § 33. The Panel legislation allows applications to be made to the Panel for 24 months after the date of the enactment of the Panel legislation--June 6, 2001. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3.o.; GSF Law § 29. There will be no cap either on the amount, or on the value, of publicly-owned property that may be claimed and/or restituted under the Panel legislation. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3; GSF Law §§ 23-38. The *in rem* return of works of art will be excepted from the scope of the Panel legislation. Eizenstat Decl. ¶ 24 and Ex. B, Annex A, ¶ 3.r.[6/]

On June 6, 2001, the Austrian Federal Government amended certain pension and social benefits laws to assist victims of National Socialism. Eizenstat Decl. ¶ 25 and Ex. B, Annex A, ¶ 4; GSF Law Arts. 2, 3. The value of these changes will be approximately $112 over the next ten years. Eizenstat Decl. ¶ 25.

The Austrian National Fund will provide all administrative support for the Committee. Eizenstat Decl. ¶ 26 and Ex. B, Annex A, ¶ 2.a.; GSF Law § 3. The costs of the "claims-

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[6/] Contrary to plaintiffs' assertion, see First Amended Class Action Complaint ¶ 23, no Austrian province or municipality will benefit from any form of assistance from the United States with regard to "legal closure" in relation to claims for *in rem* restitution of publicly owned property unless or until the Austrian Federal Government notifies the United States Government that such province or municipality has either adopted procedures for *in rem* restitution similar to those provided for by the GSF or agrees to accept the recommendations of the Panel. See Eizenstat Decl. Ex. B, Annex A, ¶ 10.

based" and "equity-based" process will also be covered from the budget of the Austrian National Fund, and, where appropriate, out of the capital of the GSF. Eizenstat Decl. ¶ 26 and Ex. B, Annex A, ¶ 2.m. The administrative costs of the *in rem* process will be paid by the Austrian Federal Government. Eizenstat Decl. ¶ 26; GSF Law § 23. Attorneys' fees will be paid out of the GSF's initial capital. Eizenstat Decl. ¶ 26. Lawyers in United States court actions can seek fees through an arbitration process, with the aggregate fee award capped at $3.6 million. Id.[7]

The GSF legislation requires that the GSF, in conjunction with the Austrian National Fund, provide extensive publicity concerning the benefits that the GSF will offer and the procedures for applying for such benefits. Eizenstat Decl. ¶ 27 and Ex. B, Annex A, ¶ 2.1.; GSF Law § 39. The Austrian National Fund will consult with the United States concerning the proposed publicity plan. Eizenstat Decl. ¶ 27 and Ex. B, Annex A, ¶ 2.1.

A key point regarding the GSF is that all victims with Nazi-era claims against Austria and/or Austrian companies not covered by the Reconciliation Fund are eligible to submit claims to the GSF, including claims for *in rem* restitution of publicly-owned property, but excluding claims for *in rem* restitution of works of art. Eizenstat Decl. ¶ 28 and Ex. B, Annex A, ¶¶ 2-3. Indeed, throughout the negotiations,

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[7] Counsel representing the victims are eligible to receive less, on a percentage basis, of the GSF capital than the notably low percentage that attorneys in the recently-approved settlement between Holocaust victims and Swiss Banks can receive from that settlement fund. See Eizenstat Decl. ¶ 26; In r Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 146 (E.D.N.Y. 2000). In fact, counsel representing the victims are eligible to receive virtually the identical amount, on a percentage basis, as counsel representing the victims in the context of the German Foundation. See In re Nazi Era Case Against German Defendants Litigation, 198 F.R.D. 429 (D.N.J. 2000).

attorneys representing the victims vigorously represented not only the named plaintiffs, but also the interests of heirs and others who are similarly situated. Eizenstat Decl. ¶ 28.

4. This Litigation

On July 25, 2001, this Court approved the stipulation plaintiffs and defendants proposed to dismiss the forced and slave labor claims from this suit. See Whiteman v. Federal Republic of Austria, Civ. A. No. 00-8006 (S.D.N.Y. July 25, 2001) (Stipulation and Order). The case before the Court, as it now stands, includes Nazi-era property/aryanization claims against Austria and Austrian companies. See First Amended Class Action Complaint ("Complaint"). With regard to these claims, plaintiffs are potentially eligible to receive payments from the GSF. Defendants now seek to expedite dismissal of the property/aryanization claims, as they previously did with regard to the other claims raised in the Complaint (the slave and forced labor claims), so as to allow the GSF to begin making payments.

The remaining claims in this case are similar not only to those this Court dismissed on July 25, 2001, but also the claims set forth in numerous cases that previously were transferred to Judge William G. Bassler of the United States District Court for the District of New Jersey by the Judicial Panel on Multidistrict Litigation pursuant to the request of the majority of the parties, supported by the United States. In that context, Judge Bassler endorsed the recommendation of the parties and the United States that the Court accept the German Foundation "Remembrance, Responsibility, and the Future" as the exclusive remedy for World War II and Nazi-era claims against German companies, and dismissed cases against German companies before the Court. See In re Nazi Era Case Against German Defendants Litigation, 198 F.R.D. 429 (D.N.J. 2000).

DISCUSSION

1. Dismissal Of The Claims In This Action Would Be In The United States' Foreign Policy Interests.

It is in the foreign policy interests of the United States for the GSF to be the exclusive forum and remedy for the resolution of all claims asserted against Austria and/or Austrian companies arising out of or relating to the National Socialist era or World War II, excluding claims for *in rem* restitution of works of art, and further excluding claims covered by the Reconciliation Fund. Eizenstat Decl. ¶¶ 4, 15, 29, 38. Accordingly, the United States Government believes that all claims against Austria and/or Austrian companies arising out of or related to the National Socialist Era and World War II, excluding claims for *in rem* restitution of works of art, and further excluding claims covered by the Reconciliation Fund, should be pursued through the GSF instead of the courts. Id.; Statement of Secretary of State Madeline K. Albright ("Albright Statement") ¶¶ 2, 10 (attached hereto as Ex. 5). The United States' interests in supporting the GSF are explained below.

First, it is an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era, who are elderly and are dying at an accelerated rate, in their lifetimes. Albright Statement ¶ 4; Eizenstat Decl. ¶ 30. As noted earlier, the United States believes the best way to accomplish this goal is through negotiation and cooperation.

The GSF, like the Reconciliation Fund, the German Foundation, and the French Bank Fund, is an excellent example of how such cooperation can lead to a positive result. Id. ¶ 31. The GSF will provide benefits to more victims, and will do so faster and with less uncertainty than would litigation, with its attendant delays and legal hurdles. Id. The GSF will employ standards of proof that are more

relaxed than would be the case with litigation in U.S. courts. Id. Litigation even if successful, moreover, could only benefit claimants subject to the jurisdiction of U.S. courts. Id. By contrast, the GSF will benefit all those with Nazi-era property/aryanization claims--against existing and defunct companies, against private and public companies, and against S.S.-controlled companies--as well as those with claims not covered by the Reconciliation Fund. Id. Indeed, as a result of the inclusion in the GSF not only of Austrian companies that existed during the Nazi era, but also of the Austrian Federal Government and Austrian companies that did not exist during the Nazi era, the GSF, will be able to comprehensively cover all Nazi-era property/aryanization claims against Austria and/or Austrian companies, and all other claims not covered by the Reconciliation Fund. Id.

There was broad consensus among the participants in the negotiations concerning the level of the GSF's funding, eligibility criteria, payment system, and the allocation of its funding among various categories of claims. Id. ¶ 32. Although it is true that no amount of money could truly compensate plaintiffs for the wrongs done to them, the payments they will receive through the GSF, and through the enhanced social benefits the Austrian Federal Government has committed to provide, will serve as a recognition of their suffering and will enable them to live with less difficulty than would be the case without the payments. Id. Creation of the GSF will also directly benefit the heirs of victims who did not survive by ensuring the eligibility of such heirs to bring claims to the GSF on the same basis as survivors. Id.

The United States, together with the overwhelming majority of participating lawyers for the victims and other parties to the negotiations, therefore believes that the GSF is fair under all the circumstances. Id. ¶ 33. The creation of the GSF, like the creation of the Reconciliation Fund, the German Foundation, and the French Bank Fund, the United

States hopes, will serve as an example to other nations and in other cases where resolution of claims by victims of the Nazi era for restitution and compensation has not yet been achieved. Id.

Second, "[e]stablishment of the GSF will strengthen the ties between the United States and our democratic ally and trading partner, Austria." Albright Statement ¶ 5; see Eizenstat Decl. ¶ 34. One of the most important reasons the United States took such an active role in facilitating a resolution of the issues raised in this litigation is that it was asked by the Austrian Federal Government to work as a partner in helping to make both the Reconciliation Fund and the GSF initiatives a success. Albright Statement ¶ 9; Eizenstat Decl. ¶ 34. Since 1945, the United States has sought to work with Austria to address the consequences of the Nazi era and World War II through political and governmental acts, beginning with the first compensation and restitution laws in post-war Austria that were passed during the Allied occupation. Eizenstat Decl. ¶ 34. In recent years, Austrian-American cooperation on these and other issues has continued, and the joint effort to develop the Reconciliation Fund and the GSF has helped solidify the close relationship between the two countries. Albright Statement ¶¶ 5, 6; Eizenstat Decl. ¶ 34.

Austria today is an important factor in the prosperity of Europe, and particularly the new democracies of Central and Eastern Europe. Eizenstat Decl. ¶ 35. Austria has worked with the United States in promoting democracy for the last forty-six years, and is instrumental to the economic development of Central and Eastern Europe. Albright Statement ¶ 5; Eizenstat Decl. ¶ 35. A new member of the European Union, Austria has supported integration of the European Union as well as efforts to assure that the former communist countries of Central and Eastern Europe continue their democratic development within a market economy. Id.

Our continued cooperation with Austria is important to helping achieve these United States interests. Id.

Third, like the Reconciliation Fund, the GSF helps further the United States' interest in maintaining good relations with Israel and with Western, Central, and Eastern European nations, from which many of those who suffered during the Nazi era and World War II come. Eizenstat Decl. ¶ 36. Those who are eligible to make claims under the GSF include the too-long forgotten "double victims" of two of the twentieth century's worst evils--Nazism and Communism. Albright Statement ¶ 8; Eizenstat Decl. ¶ 36. Some one million citizens of Central and Eastern Europe were forced into labor by the Nazis, over 100,000 of whom worked on the territory of the present-day Republic of Austria, and then lived for over four decades under the iron rule of Communist governments and were denied compensation until recent years. Eizenstat Decl. ¶ 36. The GSF complements the German Foundation as part of a comprehensive effort to make payments to survivors and heirs with Nazi-era property/aryanization claims in these former Iron Curtain countries, and, indeed, in other European countries. Id.

Fourth, the defendants and virtually all participating plaintiffs' counsel and victims' representatives are united in seeking dismissal of Nazi-era property/aryanization claims against Austria and/or Austrian companies (and all other claims covered by the GSF) in favor of the remedy provided by the GSF, and the United States strongly supports this position. Eizenstat Decl. ¶ 37. The alternative to the GSF would be years of litigation whose outcome would be uncertain at best, and which would last beyond the expected life span of the large majority of survivors. Albright Statement ¶ 3; Eizenstat Decl. ¶ 37. Ongoing litigation could lead to conflict among survivors' organizations and among survivors and Austria and Austrian industry, conflicts into which the United States Government would inevitably be

drawn. Id. There would likely be threats of political action, boycotts, and legal steps against corporations from Austria, setting back Austrian-American economic cooperation. Id.

The Austrian Federal Government and Austrian companies have insisted on dismissal of all pending Nazi-era property/aryanization claims against Austria and/or Austrian companies (as well as any other claim covered by the GSF) as a precondition to allowing the GSF to make payments to victims. Albright Statement ¶ 10; Eizenstat Decl. ¶ 38. The United States strongly supports the creation of the GSF, and wants its benefits to reach victims as soon as possible. Eizenstat Decl. ¶ 38. In the context of the GSF, therefore, it is in the enduring and high interest of the United States to vindicate that forum by supporting efforts to achieve dismissal of (i.e., "legal peace" for) all property/aryanization claims against Austria and/or Austrian companies arising out of or relating to the Nazi era or World War II (and any other claims covered by the GSF), excluding claims for *in rem* restitution of works of art. Albright Statement ¶ 2; Eizenstat Decl. ¶ 38.

Fifth, and finally, the GSF, like the Reconciliation Fund, the German Foundation, and the French Bank Fund, is a fulfillment of a half-century effort to complete the task of bringing a measure of justice to victims of the Nazi era. "It is in the foreign policy interests of the United States to take steps to address the consequences of the Nazi era, to learn the lessons of , and teach the world about, this dark chapter in European history and to seek to ensure that it never happens again." Albright Statement ¶ 4. Although no amount of money will ever be enough to make up for Nazi-era atrocities, the Austrian Federal Government has created compensation, restitution, and other benefit programs for Nazi-era acts that have resulted in significant payments. Eizenstat Decl. ¶ 39. With the $150 million that the Austrian Federal Government is currently distributing to survivors pursuant to the

Framework, the GSF adds $210 million (plus interest), increased social benefits amounting to approximately $112 million over the next ten years, and an arbitration process for *in rem* restitution of publicly-owned property, including property formerly owned by Jewish communal organizations, to these payments and complements prior programs. Id. and Ex. B, Annex A.

The United States does not suggest that the policy interests described above in themselves provide an independent legal basis for dismissal. Because of the United States' strong interests in the success of the GSF, however, and because such success is predicated on the dismissal of the claims in this litigation, the United States recommends dismissal on any valid legal ground.

2. The GSF Provides A Fair Remedy For Nazi-Era Property/Aryanization Claims (And All Other Claims Covered by the GSF) Against Austria And/Or Austrian Companies.

The United States, together with the vast majority of the other participants in the GSF negotiations, has concluded that the results of the negotiations as embodied in the GSF are fair under all the circumstances. See Joint Statement (Eizenstat Decl. Ex. A) ¶ 1. The circumstances that lead the United States to this conclusion are described below.

Given the advancing age of the plaintiffs, it is of the highest importance that their claims are resolved quickly, non-bureaucratically, and with minimum expenditures on litigation. As noted earlier, survivors are dying at an accelerated rate, and the GSF offers those with Nazi-era claims against Austria and/or Austrian companies not covered by the Reconciliation Fund, including those with claims for *in rem* restitution of publicly-owned property, but excluding claims for *in rem* restitution of works of art, a measure of justice for their past suffering, without additional time-

consuming litigation that could delay any recovery beyond many class members' remaining lifetimes. Judge William G. Bassler recently reached the same conclusion in dismissing Nazi-era claims against German companies on the basis of the Joint Statement among the German Government, German companies, plaintiffs' counsel, and numerous representatives of victims of Nazi-era atrocities, see In re Nazi Era Case Against German Defendants Litigation, MDL No. 1337 (D.N.J. Dec. 5, 2000), as did Judge Edward Korman, who recently approved a settlement between Holocaust survivors and Swiss banks, see In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 149 (E.D.N.Y. 2000). This is the very sort of outcome that U.S. policy seeks to achieve in matters of unresolved Holocaust-era claims.

Other criteria important in evaluating the GSF include its level of funding, allocation of its funds, payment system, and eligibility criteria. As to the level of funding, the words of a Holocaust survivor who spoke in favor of the Swiss Bank settlement, cited by Judge Korman in approving that settlement, have equal force here:

> I have no quarrel with the settlement. I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure tried their very best, and I think they deserve our cooperation and . . . that they be supported and the settlement be approved.

Id. at 141.

The allocation of funds was the subject of extensive negotiation, and was approved by virtually all parties to the negotiations. See Joint Statement (Eizenstat Decl. Ex. A). Similarly, the parties have pledged that GSF payments should

be made quickly and in a non-bureaucratic manner, and under relaxed standards of proof. Id. ¶ 2. Finally, through extensive effort, the parties to the negotiations ensured that the GSF will provide a potential remedy for all victims with Nazi-era claims against Austria and/or Austrian companies not covered by the Reconciliation Fund, including those with claims for *in rem* restitution of publicly-owned property, but excluding claims for *in rem* restitution of works of art. See Eizenstat Decl. ¶ 28 and Ex. A ¶ 3.b. With these agreements, the GSF will be able to make speedy, dignified payments to many deserving victim--indeed, as noted earlier, many more than could possibly recover through litigation.

In evaluating the fairness of the GSF, it is also important to consider the difficult legal hurdles that plaintiffs face, as well as the uncertainty of their litigation prospects. It is beyond dispute that plaintiffs in this case face numerous potential legal hurdles. These include justiciability, international comity, statutes of limitation, jurisdictional issues, and forum non conveniens, as well as difficulties of proof inherent in these claims which originated more than 50 years ago and the various potential practical and legal obstacles to certification of a class of heirs. Recovery in this litigation is therefore by no means assured. Cf. In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 148-49.

3. The Republic of Austria Is Immune From The Jurisdiction Of The United States Courts in This Case.

Aside from the legal hurdles mentioned above, plaintiffs face an insurmountable obstacle in this instance because the Republic of Austria is immune from suit in United States courts with regard to the claims alleged in the Complaint. Consequently, plaintiffs' claims against the Republic of Austria must be dismissed for lack of subject matter jurisdiction.

A. Background Of U.S. Sovereign Immunity Practice.

Some background into the United States' practice concerning foreign sovereign immunity is useful to the analysis of this case. The United States has approached the question of foreign sovereign immunity in three distinct periods. In the first period (from about 1812 to 1952), the United States granted foreign sovereigns virtually "absolute" immunity from suit in United States courts. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983) (citing The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116, 136-37 (1812)). During this first period of sovereign immunity law, the courts deferred to the views of the Executive Branch on whether to exercise jurisdiction, and the State Department "ordinarily requested immunity in all actions against friendly foreign sovereigns." Id.

In 1952, United States practice concerning foreign sovereign immunity entered a second phase when the Executive Branch formally adopted the "restrictive" theory of immunity in the "Tate letter." See Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711-15 (1976) (copy of the "Tate letter"). In that letter, the State Department announced that henceforth it would recommend to United States courts, as a matter of policy, that foreign states be granted immunity only for their sovereign or public acts (jure imperii), and not for their commercial acts (jure gestionis). See Verlinden B.V., 461 U.S. at 486-87. As explained in the Tate letter, the adoption of the restrictive theory reflected the increasing acceptance of that theory by foreign states, as well as the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." Alfred Dunhill of London, 425 U.S. at 714.

Foreign sovereign immunity practice entered its third (and current) phase when Congress enacted the FSIA, which

became effective in January, 1977. Pub. L. No. 94-583, 90 Stat. 2891 (1976) codified at 28 U.S.C. §§ 1330, 1602, et seq. The FSIA, "[f]or the most part, codifies, as a matter of federal law, the restrictive theory of sovereign immunity." Verlinden B.V., 461 U.S. at 488. It contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." Id. The FSIA sets forth a general rule of foreign state immunity, 28 U.S.C. § 1604, and provides for specific exceptions to that immunity rule, id. §§ 1605-07. If the FSIA applies, it controls, since the Supreme Court has made unequivocally clear that the FSIA "'provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.'" Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993) (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)).

B. Under The Law Applicable At The Time Of The Challenged Conduct, Austria Is Entitled To Immunity From Suit.

The conduct at issue in this case occurred between 1938 and 1945. See Complaint ¶ 2. Under the principles of sovereign immunity then in force, Austria is entitled to immunity from suit.

Although plaintiffs' arguments address the provisions of the FSIA, see id. ¶ 44, the FSIA was not enacted until 1976. Pub. L. No. 94-583, 90 Stat. 2891 (1976). There is, therefore, an antecedent question whether the FSIA applies "retroactively" to govern a foreign state's claim of immunity concerning conduct occurring prior to its date of enactment.

The Second Circuit has held that the FSIA does not apply to conduct preceding the adoption of the restrictive theory of immunity. See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics, 841 F.2d 26, 27 (2d Cir. 1988); but cf. Princz v. Federal Republic of Germany, 26 F.3d 1166, 1170-

71 (D.C. Cir. 1994)(questioning, without deciding, whether application of the FSIA to pre-1952 conduct would be impermissibly retroactive). The Second Circuit has concluded that the FSIA affects the "substantive rights and liabilities" of foreign states by authorizing suits against foreign states that could not have been brought earlier. See Carl Marks, 841 F.2d at 27 (ruling that "[s]uch a retroactive application of the FSIA would affect adversely the [foreign state's] . . . settled expectation, rising 'to the level of an antecedent right,' of immunity from suit in American courts")(citation omitted).

Under Second Circuit precedent, therefore, this case is governed by the principles of sovereign immunity that prevailed during the 1940's. These principles dictate that Austria is immune from suit here. As explained above, prior to 1952, the government of the United States and the federal judiciary took the position that "foreign sovereigns and their public property are . . . not . . . amenable to suit in our courts without their consent." Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938); see also Alfred Dunhill of London, 425 U.S. at 712 (Tate Letter, noting that the United States had previously followed the "classical or virtually absolute theory of sovereign immunity"). Plaintiffs do not assert that under the absolute theory of sovereign immunity a foreign state would be subject to suit in U.S. courts for claims such as those plaintiffs assert here.

Moreover, the foreign policy of the Executive Branch does not support the exercise of jurisdiction over plaintiff's claims against Austria. The Court is not, in this case, left to its own devices to surmise the views of the Executive. Cf. Verlinden B.V., 461 U.S. at 487-88 (noting that, prior to the FSIA, courts were required to discern the likely policy of the Executive Branch in cases in which the State Department made no filing). In the Executive Agreement Austria and the United States concluded on October 24, 2000, the United

States clearly stated that it would "take appropriate steps to oppose any challenge to the sovereign immunity of the Republic of Austria with respect to any claim that may be asserted against the Republic of Austria involving or related to the use of slave or forced labor during the National Socialist era or World War II." Agreement between the Government of the United States of America and the Austrian Federal Government concerning the Austrian Fund "Reconciliation, Peace and Cooperation" (Reconciliation Fund) Art. 3(3) (attached hereto as Ex. 7). In the Exchange of Notes of January 23, 2001, the United States reaffirmed this commitment with regard to all claims covered by the GSF. See Exchange of Notes of January 23, 2001, Annex A, ¶ 10 (Eizenstat Decl. Ex. B).

For the foregoing reasons, under the absolute theory of sovereign immunity that prevailed at the time of Austria's challenged conduct,[8/] the Court lacks jurisdiction to hear plaintiff's claims against the Republic of Austria.

C. Under The Applicable Provisions Of The FSIA, The Austrian Federal Government Is Immune From Suit On Plaintiff's Claims In United States Courts.

Even if the FSIA provided the proper basis for assessing the district court's jurisdiction, the Republic of Austria is immune from this suit.

[8/] It is the position of the Executive Branch, as reflected in the Exchange of Notes of January 23, 2001, that Austria was a state enjoying sovereign immunity during the Nazi era -- from the Anschluss in March 1938 through May 1945. See Declaration on Austria at Moscow, November 1, 1945, reprinted in Sen. Exec. Rpt. No. 8, 84th Cong., 1st Sess. 3 (June 15, 1955); id. at 2. Recognition is an exclusive prerogative of the Executive Branch under Article II of the United States Constitution. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

As explained above, the general rule of the FSIA is that "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604. The FSIA also provides various exceptions to that rule. See 28 U.S.C. § 1605. Absent an exception, U.S. courts lack jurisdiction over the suit. See Nelson, 507 U.S. at 355; Amerada Hess, 488 U.S. at 443. Plaintiffs rely upon the "waiver" and "commercial activity" exceptions, 28 U.S.C. § 1605(a)(1) and (2). Specifically, plaintiffs contend that Austria's conduct constitutes a "commercial activity," and thus falls within the FSIA's exception for such activity. See Complaint ¶¶ 44, 95. Plaintiffs also argue that the Republic of Austria implicitly waived its sovereign immunity by violating basic norms of international law. See id. ¶¶ 44, 99.

The FSIA's "commercial activity" exception, 28 U.S.C. § 1605(a)(2), is not applicable to these circumstances. Moreover, plaintiffs' implicit waiver argument has been rejected by each of the four courts of appeals that has considered it and should be rejected here as well.

(1) The Actions Complained Of Do Not Come Within The "Commercial Activities" Exception Of The FSIA.

The FSIA provides an exception from immunity

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and states that

"[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

Applying the distinction between a state's public acts (jure imperii) and its private or commercial acts (jure gestionis), the Supreme Court in Nelson held that a foreign state engages in "commercial activity" where "it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'" 507 U.S. at 360 (quoting Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992)). A foreign government engages in "commercial activity" when it "acts, not as regulator of a market, but in the manner of a private player within it" Weltover, 504 U.S. at 614; see also Hanil Bank v. PT Bank Negara Indonesia, (Persaro), 148 F.3d 127, 131 (2d Cir. 1998)("A state engages in 'commercial activity' for purposes of the FSIA where it acts not in its governmental or public role, but rather like a private player in the marketplace."). The Court also clarified the statutory directive that courts examine the "nature" of the transaction rather than its "purpose," stating that "the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'" Nelson, 507 U.S. at 360-61 (quoting Weltover, 504 U.S. at 614 (emphasis in original)); H.R. Rep. No. 94-1487, 94th Cong. 2d Sess., at 16, reprinted in 1976 U.S.C.C.A.N. at 6615.

The conduct of Austria that plaintiffs complain of here does not constitute "commercial activity." Austria's acts were those of a sovereign and not those of a private player within a market. A sovereign which uses its police power to "aryanize," "loot," and "liquidate" plaintiffs' property during war, see Complaint ¶ 95; see also id. ¶¶ 3-4 (alleging that Austria is liable for its "complicity" and "aggressive

participation in a common scheme and course of conduct to . . . seek out, accept, conceal, convert and profit from assets looted, converted and/or liquidated, ("Aryanized") . . . in the course of, in connection with, and as an integral part of, the Nazi plan to dehumanize and destroy Austrian Jewry and the Austrian Jewish Community and its campaign of wholesale looting"), is not engaging in the type of activity generally performed by private entities engaged in commerce. While the suffering experienced by plaintiffs was horrific, Austria's actions were not commercial and were not actions that could be undertaken by private parties.

The actions plaintiffs allege were peculiarly sovereign in nature. See Nelson, 507 U.S. at 363 (ruling that the "powers allegedly abused were those of police and penal officers," not the sort of activity exercised by private parties); Cicippio v. Islamic Republic of Iran, 30 F.3d 164, 167-68 (D.C. Cir. 1994)(holding that kidnapping was not commercial activity under the FSIA); De Letelier v. Republic of Chile, 748 F. 2d 790, 797 (2d Cir. 1984)(determining that kidnapping and assassination could not be considered commercial activities under the FSIA); see also Millen Industries, Inc. v. Coordination Council for North American Affairs, 855 F.2d 879, 885 (D.C. Cir. 1988)("Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on sovereign activity"). The treatment plaintiffs complain of was a prolonged abuse of military power; "[h]owever monstrous such abuse undoubtedly may be, a foreign state's exercise of that power has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." Nelson, 507 U.S. at 361.[9]

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[9] Even if the acts plaintiffs complain of did constitute "commercial activity," these acts did not have a "direct effect" in the United States as contemplated by § 1605(a)(2). The Second Circuit has stated that in order for an act to have a "direct effect" in the United States within the meaning of §1605(a)(2), it must follow "as an immediate consequence of the

(2) Neither The Language Nor The Legislative History Of The FSIA Supports An Expansive Construction Of The Implied Waiver Exception To The Statute.

The FSIA provides that

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. The exceptions in sections 1605 through 1607 focus on waiver, commercial activities, U.S. property rights, torts occurring in the United States (subject to exceptions), arbitration, a limited class of acts of international terrorism and certain maritime claims. There is no general exception to immunity for violations of international law. The exceptions to immunity in the FSIA are clear and specific. A theory of constructive waiver based on violation of international law thus would be inconsistent with the intent of the statute to recognize immunity except in certain limited and identifiable situations.

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defendant's activity." United States Fidelity & Guarantee Co. v. Braspetro Oil Servs. Co., 199 F.3d 94, 98 (2d Cir. 1999). The acts plaintiffs allege here were perpetrated between 1938 and 1945 against residents of Austria in Austria by Austrian defendants. See Complaint ¶ 2. Plaintiffs allege no immediate consequence of the alleged actions in the United States. See id. ¶ 44. That is because the immediate consequence of the actions alleged were felt by residents of Austria in Austria. See Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2d Cir. 1993) (finding no "direct effect" in the United States where "all legally significant acts took place in Nigeria" and the only effect of such acts was that "an American individual or firm suffers some financial loss").

Each of the courts of appeals that have addressed the relationship of international law to sovereign immunity, including the Second Circuit, has rejected the idea that conduct by a sovereign nation in violation of basic international law norms (jus cogens) constitutes an implied waiver of immunity under the FSIA. See Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 242-45 (2d Cir. 1997); see also Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1156 (7th Cir. 2001); Princz, 26 F.3d at 1173-74; Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 718-19 (9th Cir. 1992). In each case, the court concluded that it is up to the political branches, and not the judicial branch, to determine that international law violations should give rise to exceptions to foreign sovereign immunity. See Smith, 101 F.3d at 242; see also Sampson, 250 F.3d at 1155-56; Princz, 26 F.3d at 1174-1175, n.1; Siderman, 965 F.2d at 719.[10/]

The holdings of these four courts derive from the Supreme Court's narrow construction of the exceptions to immunity. In Amerada Hess, the Court observed that "Congress had violations of international law by foreign states in mind when it enacted the FSIA," 488 U.S. at 435, citing in particular

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[10/] In Princz, the court correctly observed:

> We think something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of §1605(a)(l) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government would have normal relations with the government of the day--unless disrupted by our courts, that is.

26 F.3d at 1174-75, n.1.

section 1605(a)(3)'s denial of immunity when property rights are taken in violation of international law. The Court concluded that "[f]rom Congress' decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain implication that immunity is granted in those involving alleged violations of international law that do not come within one of the FSIA's exceptions." Id. at 436; see also Nelson, 507 U.S. at 355 (ruling that unless "a specified [FSIA] exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state").[11/]

The Supreme Court's narrow interpretation is further supported by a subsequent amendment to the FSIA in which Congress abrogated foreign states' immunity for specific acts of international terrorism. In 1996, Congress amended the FSIA to create an exception to sovereign immunity for torture, extrajudicial killing, aircraft sabotage and hostage taking, but limited the exception to suits brought by U.S. citizens against foreign governments identified by the Executive Branch as state sponsors of terrorism. Pub. L. No. 104-132, Title II, Subtitle B., § 221(a)(1), 110 Stat. 1214, 1241-42 (1996), adding 28 U.S.C. § 1605(a)(7).[12/] Section 1605(a)(7)'s limited exception for certain acts of international terrorism counsels strongly against a broad interpretation of § 1605(a)(1) under which all violations of international law are construed, ipso facto, as implied waivers of immunity. See

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[11/] The Supreme Court also observed that in passing the FSIA Congress had invoked its power to punish "Offenses against the Law of Nations," Amerada Hess, 488 U.S. at 436 (citing U.S. Const. Art. I, § 8, cl. 10). The Court took this as further indication that the omission of a general exception for violations of international law was intentional. See id.

[12/] In amending the FSIA to permit suit for certain enumerated torts abroad by designated state sponsors of terrorism, Congress expressly declined to adopt a broader approach, originally passed by the House. See 142 Cong. Rec. 4570, 4586, 4591-93 (March 13, 1996) (§ 803 of H.R. 2703, as amended); 142 Cong. Rec. 4814-15, 4836, 4846 (March 14, 1996).

Smith, 101 F.3d at 244 (noting that § 1605(a)(7) is "a carefully crafted provision that abolishes the defense [of sovereign immunity] only in precisely defined circumstances" and that this is "evidence that Congress is not necessarily averse to permitting some violations of jus cogens to be redressed through channels other than suits against foreign states in United States courts").

The Second Circuit, as well as other courts, has frequently observed that the implied waiver provision of § 1605(a)(1) in particular must be construed narrowly. See id. at 243; Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galadari, 12 F.3d 317, 325 (2d Cir. 1993)(quoting Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1017 (2d Cir. 1991)); see also Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990); Joseph v. Office of the Consulate General of Nigeria, 830 F.2d 1018, 1022 (9th Cir. 1987); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 377 (7th Cir. 1985). In support of this conclusion, the courts have cited the narrow list of examples given by Congress in the legislative history of the implied waiver provision.

Congress specifically referred to three circumstances that would constitute implied waivers--"where a foreign state has agreed to arbitration in another country," "where a foreign state has agreed that the law of a particular country should govern a contract," and "where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 18, reprinted in 1976 U.S.C.C.A.N. 6604, 6617; Smith, 101 F.3d at 243 ("All three examples . . . share a close relationship to the litigation process."). Although these examples are not exclusive, "courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." Frolova, 761 F.2d at 377; see also Princz, 26 F.3d at 1174

(quoting same); Drexel Burnham Lambert, 12 F.3d. at 325 (accepting the notion that "courts have been reluctant to find an implied waiver where the circumstances" of the waiver were ambiguous); Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 577 (2d Cir. 1993)(explaining that a more expansive interpretation of the implied waiver exception would "vastly increase the jurisdiction of the federal courts over matters involving sensitive foreign relations").

More particularly, the examples listed by Congress reflect that an implied waiver should not be found "without strong evidence that this is what the foreign state intended." Frolova, 761 F.2d at 377; see also id. at 378 ("[W]aiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so.")(emphasis added)); Princz, 26 F.3d at 1174 ("[T]he amici's jus cogens theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)"); Drexel Burnham Lambert, 12 F.3d at 326 (ruling that waiver must be "unmistakable" and "unambiguous"). Plaintiffs' arguments in this case are inconsistent with the intentionality requirement of the implied waiver provision. Congress has not adopted a broad forfeiture of immunity for violations of international law. It is not the role of the courts to do so.

CONCLUSION

The GSF not only fulfills the foreign policy interests of the United States, but also provides benefits to the public interest that reach beyond the scope of any single litigation. The United States, therefore, urges the Court to dismiss the remaining claims in this matter on any valid legal ground. The United States points out that one such legal ground--sovereign immunity--is determinative here; the Republic of Austria is immune from the jurisdiction of the courts of the United States in this case.

Respectfully submitted,

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Dated: October 9, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2001, I caused a true and correct copy of the foregoing Statement of Interest of the United States of America to be served via first class mail, postage pre-paid, on the following:

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/s/ William Kirschner
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January 17, 2001

Joint Statement

The Governments of the Republic of Austria ("Austria") and the United States of America ("United States"),

Austrian companies,

The Conference on Jewish Material Claims (including the Central Committee of Jews from Austria in Israel and the American Council for Equal Compensation of Nazi victims from Austria),

The Austrian Jewish Community,

As further participants, the undersigned attorneys,

Noting that through the General Settlement Fund (providing for a Claims Committee and an Arbitration Panel), to be established under Austrian federal law and funded by contributions from Austria, including Austrian companies, Austria and Austrian companies acknowledge in accordance with the declaration of the Austrian Federal Government of February 3, 2000 the moral responsibility arising out of the tragic history of the 20th century and the horrendous crimes and injustices of the National Socialist era and reaffirming the commitment to a self-critical scrutiny of the National Socialist past,

Noting that in the same declaration the Austrian Federal Government committed itself to ensure unreserved clarification, exposure of the structures of injustice, of National Socialism and the transmission of this knowledge to coming generations as a warning for the future, as well as to Austria's facing up to the light and dark sides of its past and to the deeds of all Austrians, good and evil, as its responsibility,

Noting the statement by Federal President, Thomas Klestil of October 24, 2000 at the occasion of the signing of the Agreement to settle the forced and slave labor issue,

Taking into account all measures of restitution, compensation and social welfare benefits for victims of National Socialism that have already been carried out by Austria in the past, while at the same time acknowledging that there were certain gaps and deficiencies in such measures,

Recalling the statement by Federal Chancellor Wolfgang Schuessel, on the occasion of the 55th anniversary of the re-establishment of the Republic of Austria, at the meeting of the Council of Ministers on April 28, 2000, affirming that Austrians stand by the onerous heritage of their country and acknowledging that, when it comes to questions of restitution, compensation, and material reparation, the Second Republic was often too hesitant,

Considering Austria's legal status during the period of occupation by Nazi-Germany in 1938 and liberation by the Allied Powers in 1945, and further noting all provisions of the 1943 Moscow Declaration by the Allied Powers,

Recalling the relevant provisions of the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria, the 1959 Exchange of Notes Constituting an Agreement between the United States of America and Austria relating to the Settlement of Certain Claims under Article 26 of the Austrian State Treaty of May 15, 1955,

With a view to obtaining all-embracing and enduring legal peace with respect to all claims that have been or may be asserted against Austria and/or Austrian companies, as defined in Annex B, arising out of or related to the National Socialist era or World War II, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement between the Austrian Federal Government and the Government of the United States of America concerning the

Austrian Fund "Reconciliation, Peace, and Cooperation" ("Agreement") shall continue to govern, and further excluding *in rem* claims for works of art, and achieving legal closure of such claims, in accordance with Articles 2(2), 2(3), and 3(3) of the Agreement,

Understanding that insofar as the sum of USD 210 million to be made available by Austria and Austrian companies (including the Austrian insurance industry) for the General Settlement Fund is concerned, that sum is both a ceiling and a final amount and that all payments made from, and all costs incurred in connection with the General Settlement Fund shall be financed from that sum and the interest thereon, this with the exception of the administrative costs normally incurred by the National Fund.

Determined to secure by measures enumerated in Annex A a final global resolution and closure concerning all Austrian Jewish Communal properties, assets and interests that were seized liquidated or rendered defunct during the National Socialist era and its aftermath,

Recognizing that it would be in the participants' interest for the General Settlement Fund to be the exclusive forum for the resolution of all claims that have been or may be asserted against Austria and/or Austrian companies arising out of or related to the National Socialist era or World War II, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement shall continue to govern, and further excluding *in rem* claims for works of art, Recognizing that the establishment of the General Settlement Fund does not create a basis for claims against Austria and/or Austrian companies,

Declare as follows:

1. All participants welcome and support, and declare their agreement with, the provision of immediate compensation for survivors pursuant to Annex A, paragraph 1, the

establishment of the General Settlement Fund, established in conformity with the principles set forth in Annex A, paragraphs 2 and 3, and the measures for victims of National Socialism set forth in Annex A, paragraphs 4-9. The interests of those who suffered losses or damages arising out of or related to the National Socialist era or World War II, and their heirs, have been duly taken into account. Based on the circumstances, the participants consider the overall result fair to the victims and their heirs.

2. Given the advanced age of the victims concerned, the primary humanitarian objective of the provision of immediate compensation for survivors pursuant to Annex A, paragraph 1, and the General Settlement Fund, the participants will work to show results as soon as possible. All participants will work together in a cooperative, fair, and non-bureaucratic manner to ensure that the payments reach the victims quickly.

3. The participating Governments and other participants will proceed as follows:

   a. Austria will propose the necessary legislations to establish the General Settlement Fund in conformity with the principles set forth in Annex A, paragraphs 2 and 3, seek the changes in the laws that address social benefits for victims of National Socialism in conformity with Annex A, paragraph 4, and make good faith progress on the implementation of the additional measures for victims of National Socialism set forth in Annex A, paragraphs 5-9,

   b. Austria and the United States will exchange notes. Such exchange Contains the commitments undertaken by Austria to propose legislation by April 30, 2001 to establish the General Settlement Fund and

to make good faith progress on the implementation of additional measures for victims of National Socialism. Such exchange of notes also contains the commitment undertaken by the United States to consider the provision of immediate compensation for survivors pursuant to Annex A, paragraph 1, the General Settlement Fund, established in conformity with the principles set forth in Annex A, paragraphs 2 and 3, the changes in the laws that address social benefits for victims of National Socialism in conformity with Annex A, paragraph 4, and the making of good faith progress on the implementation of the additional measures for victims of National Socialism set forth in Annex A, paragraphs 5-9, to constitute a "suitable potential remedy", as understood by Articles 2(2) and 3(3) of the Agreement, for all claims that have been or may be asserted against Austria and/or Austrian companies, as defined in Annex B, arising out of or related to the National Socialist era or World War II, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement shall continue to govern, and further excluding *in rem* claims for works of art.

c. Austria and Austrian companies (including the Austrian insurance industry) will contribute to the General Settlement Fund a total amount of US $ 210 million. The amount of US $ 210 million plus interest, as set out below in paragraph e, is in addition to the US $150 million that will be distributed by the Austrian National Fund in accordance with paragraph 1 of Annex A.

d. The contribution of US $ 210 million shall be due and payable to the General Settlement Fund once (1) the Exchange of Notes enters into force and

(2) 30 days have passed since all pending claims against Austria and/or Austrian companies, as of June 30, 2001, arising out of or related to the National Socialist era or World War II, including those lawsuits listed in Annex C, have been dismissed with prejudice, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement shall continue to govern, and further excluding *in rem*claims [*sic*] for works of art. Once the contribution has been made, distribution will begin in accordance with the procedures laid down in Annex A.

e. From the due date of the contribution interest at the Euribor rate shall accrue on the funds available at any given time until the General Settlement Fund has paid all approved claims. Austria will make available reasonable advanced funding to provide appropriate publicity concerning the establishment of the General Settlement Fund.

f. The undersigned counsel for plaintiffs will file motions or stipulations to dismiss with prejudice all claims, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement shall continue to govern, and further excluding *in rem* claims for works of art, they have filed in U.S. courts against Austria and/or Austrian companies arising out of or related to the National Socialist era or World War II, including those listed in Annex C. They will also cooperate in seeking the dismissal with prejudice of all other such claims.

g. Austria and the United States will exchange notes and the United States will thereupon take appropriate steps in accordance with Articles 2(2), 2(3) and 3(3) of the Agreement to assist Austria and

Austrian companies in achieving legal peace for all claims that have been or may be asserted against Austria and/or Austrian companies arising out of or related to the National Socialist era or World War II, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement shall continue to govern, and further excluding *in rem* claims for works of art,

For the Government of the Republic of Austria
/s/ Ernst Sucharipa

For the Government of the United States of America
/s/ Stuart E. Eizenstat

For Austrian Companies and Private Sector
/s/ Pichler

For the Austrian Jewish Community
/s/ AM see my letter of January 17. 2001

For the Conference on Jewish Material Claims (including the Central Committee of Jews from Austria in Israel and the American Council for Equal Compensation of Nazi victims from Austria)
/s/ Israel Singer /s/ Kurt Ladner /s/ Gideon Taylor

Lawrence Kill
for Anderson, Kill, & Olick, P.C.
/s/ Lawrence Kill

Edward Fagan
for Fagin & Associates
/s/ Edward D. Fagan

Carey D'Avino /s/ D'Avino

/s/ Barry Fisher
Barry Fisher
for Fleishman & Fisher

/s/ Robert Swift
Robert Swift
for Kohn, Swift & Graf, P.C.

Morris A. Ratner
for Lieff, Cabraser, Helmann & Bernstein, L.L.P.
/s/ Morris A. Ratner

Deborah M. Sturman
for Milberg, Weiss, Bershad, Hynes & Lerach
/s/ Deborah Sturman

E. Randol Schoenberg
for the Law Offices of E. Randol Schoenberg
/s/ Randol Schoenberg

Michael Hausfeld
for Cohen, Milstein, Hausfeld & Toll, P.C.
/s/ Michael Hausfeld

J. Dennis Faucher
for Miller, Faucher, Cafferty, & Wexler, L.L.P.

Martin Mendelsohn
for Verner, Liipfert, McPherson & Hand
/s/ Martin Mendelsohn

Herbert Fenster
for McKenna & Cuneo, L.L.P.

Lorenz Gudenus

/s/ Elisabeth Steiner
Elisabeth Steiner

/s/ Michael Witti by Edward D. Fagan
Michael Witti

Federal Law on the Establishment of a General Settlement Fund for Victims of National Socialism and on Restitution Measures (General Settlement Fund Law), as well as on an Amendment to the General Social Security Law and the Victims Assistance Act (Federal Law Gazette I No. 12/2001) [Unofficial Translation]

The National Council has resolved:

Article 1

Federal Law on the Establishment of a General Settlement Fund for Victims of National Socialism and on Restitution Measures (General Settlement Fund Law)

Part 1
General Settlement Fund

Title 1
Establishment of the General Settlement Fund

Establishment and Purpose of the Fund

§ 1. (1) In order to comprehensively resolve open questions of compensation of victims of National Socialism for losses and damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era, the General Settlement Fund (in short: Fund) shall be established.

(2) The Fund's purpose shall be to acknowledge, through voluntary payments, the moral responsibility for losses and damages inflicted upon Jewish citizens and other victims of National Socialism as a result of or in connection with the National Socialist Regime. The return of works of art shall be governed by the special legislation presently in force.

(3) The Fund shall be an institution of the Republic of Austria, subject to Austrian law, shall be an independent legal entity, and shall exclusively serve non-profit purposes. The Fund shall have its headquarters in Vienna. It shall be exempt

from all federal taxes and duties. The payments provided by the Fund shall be governed by the principles guiding the public administration acting under private law.

(4) The Fund shall be regarded as dissolved once its tasks are fully completed.

Capital of the Fund

§ 2. (1) To carry out its tasks, the Fund shall be endowed with an amount of 210 million US Dollars. This amount shall be made available, at the latest, 30 days after all claims in the United States pending as of June 30, 2001 against Austria or Austrian companies arising out of or related to the National Socialist era or World War II have been dismissed. Excepted therefrom are claims covered by the Reconciliation Fund, Federal Law Gazette I, No. 74/2000, claims for the return of works of art, as well as claims for *in rem* restitution against provinces or municipalities, unless or until the latter have availed themselves of the option under § 38. Furthermore, the Fund may dispose of the interest that will accrue at the 3-month Euribor rate from investment by the Fund, starting with the date cited above and continuing for the entire duration of the Fund. The endowment of the Fund shall thus be complete. There shall be no obligation for additional funding.

(2) Contributions to the Fund shall not be subject to inheritance and gift taxes or similar financial burdens having the same purpose or effect. They may be treated as company expenditures.

(3) Yields from the Fund's capital and other revenues shall be used exclusively for the Fund's purposes. This includes the necessary costs for personnel, material and administration of the Fund, including the costs of the Claims Committee, in so far as these cannot be covered by the budget of the National Fund.

(4) The legal transactions necessary for carrying out the Fund's tasks shall be exempt from federal legal fees.

Organs of the Fund

§ 3. (constitutional provision) The organs of the Fund shall be the organs of the National Fund of the Republic of Austria for Victims of National Socialism, Federal Law Gazette I, No. 432/1995, as amended, that is, the Board of Trustees and the Secretary General. The Claims Committee specified in § 4 shall take the place of the Committee. Unless the present Federal Law provides otherwise, the administrative tasks of the Fund and its external representation shall be carried out in accordance with the principles of the Federal Law on the National Fund of the Republic of Austria for Victims of National Socialism, Federal Law Gazette No. 432/1995, as amended.

Claims Committee

§ 4. (1) An independent Claims Committee shall be set up to decide on claims for payments from the Fund. The Claims Committee shall take its decisions by a majority vote, unless unanimity is specifically prescribed.

(2) (constitutional provision) Members of the Claims Committee shall be:

1. one member to be appointed by the Government of the United States of America;
2. one member to be appointed by the Austrian Federal Government;
3. one member to be appointed by the above members as chairperson.

(3) In the event that the members appointed according to Subparagraphs. 1 and 2 are unable to agree upon the chairperson within 60 days after the entry into force of the present Federal Law, the Government of the United States of

America and the Federal Government [of Austria] will enter into consultations to name a chairperson.

(4) The members of the Claims Committee shall serve in an honorary capacity.

(5) The National Fund shall provide technical and administrative support to the Claims Committee, making use to the greatest extent possible of its administrative infrastructure. The National Fund shall be reimbursed for the resulting additional costs in accordance with the first sentence of § 2 (3).

Title 2
General Provisions

Distribution of Funds

§ 5. (1) Of the funds available for payments to entitled persons one half shall be reserved for payments in the claims-based process, and one half for payments in the equity-based process.

(2) Of the funds available for payments to entitled persons, the equivalent in Schillings of 25 million US Dollars shall be allocated for payments for insurance policies. In the event that this amount is exhausted, and this is certified by the Claims Committee, in consultation with representatives of the plaintiffs' attorneys recommended by the Government of the United States, an amount of up to 5 million US Dollars from the amount allocated to the claims-based process may be used to pay insurance claims.

(3) After expiration of the filing period, the Board of Trustees shall, following consultation with the Claims Committee, calculate the total amount of funds available for payments to entitled persons after deduction of the Fund's expenditures.

(4) After completion of the tasks of the Fund, any remaining funds shall be transferred to the National Fund of the Republic of Austria for Victims of National Socialism. These

funds shall be used for programs to benefit victims of National Socialism, including members of the Roma community.

Eligibility

§ 6. (1) Persons (in the claims-based process also associations), who/which were persecuted by the National Socialist regime on political grounds, on grounds of origin, religion, nationality, sexual orientation, or of physical or mental handicap or of accusations of so-called asociality, or who left the country to escape such persecution, and who suffered losses or damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era shall be eligible to file an application.

(2) In addition, applying *mutatis mutandis* the provisions of the [Austrian] General Civil Code, heirs of eligible claimants as defined in Paragraph 1 shall also be eligible to file an application. In case of a defunct association, an association which the Claims Committee regards as the legal successor shall be entitled to file an application as well.

General Conditions for Payments

§ 7. The payments shall be awarded as a final compensation for losses and damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era. There shall be no legal right to these payments.

Filing Period

§ 8. Applications for payments are to be filed in writing no later than 24 months after the entry into force of the present Federal Law.

Multiple Applications

§ 9. Applications for compensation for damages and losses as defined in § 7 may be filed either under the claims-based or the equity-based process. In the respective processes, only one application may be filed, which may include losses and damages in multiple categories (§§ 14 and 19). Simultaneous applications in both processes based on the same loss or damage are, however, inadmissible. If an application is entirely and finally rejected under the claims-based process, the Claims Committee shall consider the application under the equity-based process.

Consideration of Prior Restitution Measures

§ 10. (1) Unless the present Federal Law provides otherwise, no payments shall be made for claims regarding losses and damages which have been finally decided by an Austrian court or administrative body or which have been settled by agreement.

(2) In the exceptional circumstances where the Claims Committee unanimously determines that such decision or settlement constituted an extreme injustice, a payment may exceptionally be awarded. (§ 15, Paragraph 1(2)).

Waiver

§ 11. (1) The condition for a payment from the Fund shall be a statement to be made by the recipient of the payment that upon receipt of a payment he or she will, for him/herself and his/her heirs, waive any and all claims against Austria and/or Austrian companies arising out of or related the National Socialist era or World War II.

(2) Such a waiver shall not preclude the claimant from bringing an action against Austria and/or Austrian companies for *in rem* restitution of a specifically identified piece of art or an action for *in rem* restitution against provinces or municipalities, unless or until the latter have availed themselves of

the option under § 38. Such a statement shall not include a waiver of any right in any prior settlement reached in courts in the United States of America.

Rules of Procedure and By-Laws

§ 12. The Claims Committee shall issue and publish rules of procedure and by-laws, in particular regarding:

1. relaxed standards of proof;
2. a simplified and expedited internal appellate procedure in the claims-based process;
3. the attendance of observers at individual procedural stages of the claims-based process under strict rules of confidentiality.

Taxes, Fees and Social Benefits

§ 13. (1) Applications to, and payments from, the Fund shall be exempt from all federal taxes and fees.

(2) (constitutional provision) Payments from the Fund shall not affect the recipient's claims to any Austrian social benefits.

Title 3
Claims-Based Process

Categories of Property

§ 14. In the claims-based process, applications may be filed for awarding payments for losses or damages in the following categories of property:

1. liquidated businesses, including licenses and other business assets;
2. real property, unless *in rem* restitution pursuant to Part 2 of the present Federal Law has been granted;
3. bank accounts, stocks, bonds, mortgages;

4. movable property, unless such property losses have been compensated by payments based on the Federal Law amending the Federal Law to Establish the National Fund of the Republic of Austria for Victims of National Socialism, Federal Law Gazette I, No. .../2001;

5. insurance policies.

Conditions for Claims and Standards of Proof

§ 15. (1) The claimant must show, under relaxed standards of proof according to Paragraph 2, proof or convincing evidence of ownership of property in one of the categories listed in § 14 or entitlement based on insurance policies at the time of confiscation/Aryanization/liquidation as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era, and that

1. such property claim was never previously finally decided by Austrian courts or administrative bodies, or settled by agreement, or

2. such a decision or settlement by agreement constituted an extreme injustice, or

3. such property claim was denied by Austrian courts or administrative bodies because of failure to produce required evidence, where such evidence was inaccessible to the claimant at that time, but has since become available.

(2) The Claims Committee shall review all applications using relaxed standards of proof. In the claims-based process, claimants must as a rule produce supporting evidence to establish eligibility. If no relevant evidence is available, eligibility for payments may also be made credible in some other way. In cases relating to Paragraph 1, Subparagraphs 1 and 3, if no contradictory evidence is presented, an affidavit, including a plausible explanation for why this claim was

never decided or settled, or why the necessary evidence was inaccessible to the claimant, shall be deemed sufficient.

Decisions of the Claims Committee

§ 16. (1). If the Claims Committee determines - in the case of § 15 Paragraph 1, Subparagraph 2 unanimously - that the claimant satisfies the evidentiary requirements mentioned in § 15, the Claims Committee shall establish the total amount of all the claimant's approved claims (claimed amount). For each application only one claimed amount shall be established. After expiration of the filing period according to § 8 and decision of all applications, the Claims Committee shall award each claimant a proportionately reduced amount (*pro rata*) on the basis of the established claimed amounts and according to the funds allocated for the claims-based process pursuant to § 5 (awarded amount). The amount awarded for each application may not exceed 2 million US Dollars. More detailed regulations shall be laid down in the by-laws and rules of procedure.

(2) In order to ensure that no claimant shall receive payments for those losses or damages for which compensation has been paid on the basis of other measures, the Claims Committee, when establishing the claimed amount, shall take particularly into account the following restitution and compensation measures:

1. Payments based on the Federal Law amending the Federal Law to Establish the National Fund of the Republic of Austria for Victims of National Socialism, Federal Law Gazette I, No. .../2001;

2. Payments and measures of the German Foundation "Remembrance, Responsibility and Future", German Federal Law Gazette I, No. 38/2000;

3. Settlement of claims under the Insurance Reconstruction Act, Federal Law Gazette No. 185/1955, the Insurance

Indemnification Act, Federal Law Gazette No. 130/1958, or on the basis of claims settlement procedures of the "International Commission on Holocaust Era Insurance Claims" (ICHEIC); or

4. Settlement of claims on the basis of the Bank Austria Settlement.

Appeal for a New Decision

§ 17. In the event of a negative decision by the Claims Committee on the claimed amount, the claimant may file an appeal for a new decision. Such an appeal shall specify the reasons why a revised decision would be justified. In particular, such reasons may include references to new circumstances or errors in fact or in law in the decision of the Claims Committee. More detailed regulations shall be laid down in the by-laws and rules of procedure.

Insurance Claims

§ 18. (1) Within the framework of the claims-based process, the Claims Committee shall decide on all insurance claims (§ 14, Subparagraph 5) against Austrian companies, unless these claims are directed at companies which

1. are considered "German companies" under the German Law for the Establishment of the Foundation "Remembrance, Responsibility and Future", German Federal Law Gazette I No. 38/2000; or

2. are already covered by ICHEIC.

(2) In taking decisions on insurance policies (§ 14, Subparagraph 5), the Claims Committee shall apply *mutatis mutandis* the ICHEIC claims-handling procedures, including those pertaining to valuation, standards of proof, and relevant decisions by the chairperson. In doing so, particularly prior compensation measures shall be taken into account according to § 16 Paragraph 2.

(3) If the Claims Committee determines that all conditions for the approval of an insurance claim are met, it shall authorize in accordance with the principles of § 16 Paragraph 1 the disbursement of a payment from the capital of the Fund allocated pursuant to § 5 Paragraph 2. All funds used to pay approved insurance claims shall be distributed on a pro rata basis.

(4) The Austrian Insurance Association shall, to the extent available, make the lists of policyholders who are possible victims of National Socialism as defined in § 6, Paragraph 1, publicly accessible.

Title 4
Equity-Based Process

Categories

§ 19. In case the claimant is not able, under the standards of proof of the claims-based process, to document specific claims or make them credible, applications may be submitted to the Claims Committee in the equity-based process for awarding payments for losses or damages in the following categories:

1. for any of the categories of property mentioned above in § 14;

2. for occupational or educational losses as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era; or

3. for any other claims for losses or damages arising as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National-Socialist era, unless those claims are covered by the Federal Law concerning the Fund for Voluntary Payments by the Republic of Austria to Former Slave Laborers and Forced Laborers of the

National Socialist Regime, Federal Law Gazette I No. 74/2000, or by the provisions on *in rem* restitution of publicly-owned property pursuant to Part 2 of the present Federal Law.

Special Conditions for Payments

§ 20. If the Claims Committee has reason to believe that

1. there is a valid case of loss of property in any of the categories of property listed in § 14, or - where such claim was finally decided by Austrian courts or administrative bodies, or settled by agreement - that such a decision or settlement was inadequate;

2. the claimant was not adequately compensated for losses as defined in § 19 Subparagraph 2; or

3. a claim raised pursuant to § 19 Subparagraph 3 is justified, the Claims Committee may award an equity-based payment.

Payment per Household

§ 21. (1) Equity-based payments of the Fund shall be made on a per-household basis. The Claims Committee may not award more than one equity-based payment per household. More detailed regulations shall be laid down in the by-laws and rules of procedure.

(2) The term "household", as used in the present Federal Law, shall mean any household-like shared living quarters on the territory of the present-day Republic of Austria between March 12, 1938 and May 9, 1945. A household consists of survivors who shared living quarters in a household-like fashion at the time, and of heirs of those members of the household who did not survive.

(3) Applicants in the equity-based process shall, to the extent possible, indicate the address or location of the household for which they seek an equity-based payment, as well as the other

members of the household including the heirs of those who did not survive, who are entitled to share the equity-based payment.

Exclusion of Appeal

§ 22. Decisions made by the Claims Committee under the equity-based process cannot be appealed.

Part 2
In rem Restitution

Title 1
Arbitration Panel for *in rem* Restitution

Establishment of the Arbitration Panel

§ 23. (1) An Arbitration Panel for the examination of applications for *in rem* restitution of publicly-owned property shall be established with the Fund.

(2) (constitutional provision) Members of the Arbitration Panel shall be:

1. one member to be appointed by the Government of the United States of America;
2. one member to be appointed by the Austrian Federal Government;
3. one member to be appointed by the above members as chairperson.

(3) The members should be familiar with the relevant rules and provisions of Austrian and international law, in particular with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(4) In the event that the members appointed according to Paragraph 2, Subparagraphs 1 and 2 are unable to agree upon the chairperson within 60 days after the entry into force of the present Federal Law, the Government of the United States of

America and the Federal Government [of Austria] will enter into consultations to name a chairperson.

(5) The members of the Arbitration Panel shall serve in an honorary capacity. Any expenses incurred by the members as well as the necessary costs for personnel and material shall be borne by the Federation [*Bund*], making use to the greatest extent possible of the administrative infrastructure of the Fund.

By-Laws and Rules of Procedure

§ 24. The Arbitration Panel shall establish and publish by-laws and rules of procedure, in particular about requirements for applicants regarding burden of proof and rules of evidence.

Liaison with the Historical Commission

§ 25. The chairperson of the Austrian Historical Commission shall appoint a liaison person to the Arbitration Panel.

Title 2
Settlement of Claims

Case-by-Case Examination

§ 26. The Arbitration Panel shall examine applications for *in rem* restitution of publicly-owned property on a case-by-case basis.

Eligibility

§ 27. (1) Persons and associations who/which were persecuted by the National Socialist regime on political grounds, on grounds of origin, religion, nationality, sexual orientation, or of physical or mental handicap, or of accusations of so-called asociality, or who left the country to escape such persecution, and who suffered losses or damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era shall be eligible to file an application.

(2) In addition, applying *mutatis mutandis* the provisions of the [Austrian] General Civil Code, heirs of eligible claimants as defined in Paragraph 1 shall also be eligible to file an application. In case of a defunct association, an association which the Arbitration Panel regards as the legal successor shall be entitled to file an application as well.

Publicly-Owned Property

§ 28. (1) For the purposes of *in rem* restitution, the notion of "publicly-owned property" shall cover exclusively real estate (land) and buildings (superstructures) which

1. between March 12, 1938 and May 9, 1945, were taken from the previous owners whether without authorization or on the basis of laws or other orders, on political grounds, on grounds of origin, religion, nationality, sexual orientation, or of physical or mental handicap, or of accusations of so-called asociality, in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era; and

2. were never the subject of a claim that was previously decided by an Austrian court or administrative body, or settled by agreement, and for which the claimant or a relative has never otherwise received compensation or other consideration; except in exceptional circumstances where the Arbitration Panel unanimously determines that such a decision or settlement constituted an extreme injustice; and which

3. on January 17, 2001 were exclusively and directly owned by the Federation [*Bund*], or any legal person under public or private law wholly-owned, directly or indirectly, by the Federation.

(2) For the purposes of *in rem* restitution to Jewish communal organizations, the notion of "publicly-owned property" shall

furthermore cover tangible movable property, particularly cultural and religious items, which

1. between March 12, 1938 and May 9, 1945, was taken from the previous owners whether without authorization or on the basis of laws or other orders, on political grounds, on grounds of origin, religion, nationality, sexual orientation, or of physical or mental handicap, or of accusations of so-called asociality, in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era; and
2. was never the subject of a claim that was previously decided by an Austrian court or administrative body, or settled by agreement, and for which the claimant or a relative has never otherwise received compensation or other consideration; except in exceptional circumstances where the Arbitration Panel unanimously determines that such a decision or settlement constituted an extreme injustice; and which
3. on January 17, 2001 was exclusively and directly owned by the Federation [*Bund*], or any legal person under public on private law wholly-owned, directly or indirectly, by the Federation.

Filing Period

§ 29. Applications to the Arbitration Panel are to be filed in writing no later than 24 months after establishment of the Arbitration Panel or one year after the date the Austrian Historical Commission issues its final report at the latest.

Basis of Examination

§ 30. The Arbitration Panel shall make recommendations on the basis of evidence submitted by the claimant and submissions of the Austrian Federal Government, as well as any relevant findings of the Austrian Historical Commission.

Status of Ownership

§ 31. If the claimant asserts that a property is publicly-owned, the Arbitration Panel shall verify in cooperation with the Federal Government whether this is the case.

Prior Measures

§ 32. (1) As a matter of principle, the Arbitration Panel shall not have the authority to reopen or reconsider cases that were previously decided by Austrian courts or administrative bodies, or settled by agreement. Neither the claimant nor a relative (in the case of an association also its legal predecessor) must have otherwise received compensation or other consideration for the property in question.

(2) Excepted therefrom are only cases where

1. the Arbitration Panel unanimously determines that a prior settlement constituted an extreme injustice; or
2. the claim was denied because of failure to produce required evidence, where such evidence was inaccessible to the claimant at the time but has since become accessible.

Examination Period

§ 33. The Arbitration Panel shall issue recommendations and dismissals within six (6) months of the Fund's receiving an application.

Recommendations and Dismissals

§ 34. After examination of the application, the Arbitration Panel shall make a recommendation to the competent Austrian Federal Minister for *in rem* restitution, or dismiss the claim. Where *in rem* restitution, although merited, is not practical or feasible, the Arbitration Panel may recommend, in consultation with the competent Austrian Federal Minister, that the claimant be awarded a comparable property.

Taxes and Fees

§ 35. Applications to the Arbitration Panel and awards based on its recommendations shall be exempt from all federal taxes and fees.

Obligation to Publish Recommendations

§ 36. Recommendations by the Arbitration Panel shall be published.

Disposition of Federal Property

§ 37. (1) If the Arbitration Panel recommends *in rem* restitution or the conveyance of a comparable property, the Federal Minister of Finance shall be authorized, to the extent of the recommendation, to dispose of parts of the immovable or movable federal property irrespective of the estimated value by voluntary conveyance.

(2) If a property is exclusively and directly owned by a legal person under public or private law wholly-owned, directly or indirectly, by the Federation (§ 28 Paragraph 1, Subparagraph 3 and Paragraph 2, Subparagraph 3), the executive bodies of such a legal person have to comply with the proprietary instructions of the respective competent Federal Minister, in concert with the Federal Minister of Finance, regarding the voluntary conveyance of such property.

(3) Dispositions of property may only be made after expiry of the filing period according to § 29.

Provinces and Municipalities

§ 38. If and as far as provinces and municipalities provide for *in rem* restitution of publicly-owned property, they may provide for the Panel to examine applications for *in rem* restitution, applying *mutatis mutandis* the above provisions. The costs incurred therefrom shall be borne by the respective province or municipality.

Part 3
Entry Into Force and Final Provisions

Publicity Measures

§ 39. Within two months of entry into force of the present Federal Law, the Fund shall assure adequate worldwide publicity of the payments that may be made pursuant to the present Federal Law. Such publication shall, in particular, include information about the Fund, the conditions for payments, filing periods and the necessary examination of data.

Provision of Information

§ 40. (1) The Fund and its organs established according to the present Federal Law shall be authorized to obtain from public authorities and other public institutions all information necessary to fulfill its tasks. Information may only be withheld if prohibited by specific statutory provisions or if the protected interest for secrecy of the affected person outweighs the legitimate interest for information of the Fund and its organs.

(2) Any information obtained may only be used for purposes according to the present Federal Law; a claimant's personal data may only be used for the purpose of payments or awards. The use of these data for other purposes shall be permissible only upon explicit consent of the claimant.

Gender-Related Terms

§ 41. The terms used in the present Federal law relating to individuals apply equally to women and men, wherever this is relevant.

International Agreements

§ 42. International Agreements dealing with the consequences of the National Socialist era or World War II, in particular the State Treaty for the Re-establishment of an Independent and

Democratic Austria, Federal Law Gazette No. 152/1955, as well as the Exchange of Notes of 1959 between the United States of America and Austria relating to the Settlement of Certain Claims under Article 26 of the Austrian State Treaty, shall not be affected by the present Federal Law. Thus, there shall be no legal right to payments or awards under the present Federal Law.

Entry into Force

§ 43. (constitutional provision) The present Federal Law shall enter into force once it has been ensured that the capital mentioned in § 2 will be available in its entirety. The Federal Government shall announce the day of entry into force of the present Federal Law in the Federal Law Gazette I.

Dismissal of Claims

§ 44. (1) Payments and awards under the present Federal law may be made only after all claims under § 2, Paragraph 1, have been dismissed. The Federal Government shall announce that day in the Federal Law Gazette I.

(2) The expression "Austrian companies", as used in the present Federal Law, is defined in the Annex to this Federal Law.

Annex

Definition of the Expression "Austrian Companies"

The expression "Austrian companies", as used in the present Federal Law, is defined as follows:

1. Enterprises that, at any given time, had or have their headquarters within the borders of the present-day Republic of Austria as well as their parent companies (past or present, direct or indirect), even when the latter had or have their headquarters abroad.

2. Enterprises situated outside the bonders of the present-day Republic of Austria in which Austrian enterprises as

described in Sentence (1), at any given time, had or have a direct or indirect financial participation of at least 25 percent.

3. a. An "enterprise" or "company" means any entity, whether organized under public or private law as a corporation, partnership, sole proprietorship, association of business entities, society, community, cooperative, non-profit organization or otherwise as well as any municipality, private or other public law entity. Any enterprise (in the above meaning) incorporated or otherwise organized under Austrian law shall be deemed for all purposes of this definition to have its headquarters in Austria. An company (in the above meaning) includes its successors, predecessors, former parents, assigns, officers, directors, employees, agents attorneys, heirs, executors, administrators, personal representatives, and current or former shareholders. Any branch office, place of business, establishment or place of work of a non-Austrian company or company (in the above meaning) located within the borders of the present-day Republic of Austria shall be deemed to be a company or enterprise (in the above meaning) that had or has its headquarters in Austria, and any such non-Austrian company or enterprise (in the above meaning) shall be deemed to be a parent or former parent as the case may be, with respect to actions or inactions of such branch or place of business.

   b. A "parent company" means any company that owns or owned a direct or indirect participation of at least 25 percent in any enterprise that had or has its headquarters in the present-day Republic of Austria.

The definition of "Austrian companies" does not include foreign parent companies with headquarters outside the present-day territory of the Republic of Austria in which the sole alleged claim arising from National Socialist injustice or World War II has no connection with the Austrian affiliate

and the latter's involvement in National Socialist injustice, unless there is a pending discovery request by plaintiff(s), of which the United States is provided by the defendant with copy to plaintiff(s), seeking discovery from or concerning National Socialist or World War II actions of the Austrian affiliate.

Article 2

Amendment of the General Social Security Act

The General Social Security Act, Federal Law Gazette No. 189/1955, amended last by the Federal Law, Federal Law Gazette I No. 5/2001, shall be amended as follows:

1. In § 502, Paragraph 6, the expression "in calendar year 1938 and earlier has completed six years of age" *shall be replaced by the expression* "was born on March 12, 1938 at the latest."

2. Following § 592 the following § 593 shall be added:

"Final Provision to Article ... of the Federal Law, Federal Law Gazette I No. Xxx/2001

§ 593. (1) § 502, Paragraph 6, as amended by the Federal Law, Federal Law Gazette I No. Xxx/2001 shall enter into force on the first day of the month following the day announced by the Federal Government pursuant to § 44 of the General Settlement Fund Law, Federal Law Gazette I No. Xxx/2001.

(2) (constitutional provision) For persons who only on the basis of § 502, Paragraph 6, as amended by the Federal Law, Federal Law Gazette I No. Xxx/2001, are able to pay retroactive contributions for the time of emigration, § 502, Paragraph 4, shall apply on the understanding that also for the time after March 31, 1959, contributions may be paid retroactively for a maximum of 180 months altogether.

(3) Persons who only on the basis of § 502, Paragraph 6, as amended by the Federal Law, Federal Law Gazette I No. Xxx/2001, are entitled to a pension payment under the present Federal Law, shall receive such payment as of the month of entry into force of the present Federal Law, provided an application is filed within one year of the entry into force of the present Federal Law, otherwise as of the first day of the month following the filing of the application. In case the applicant is still living abroad as a consequence of emigration for the reasons stated in § 500, Paragraph 1, at the time of the filing of the application, the eligibility for the entitlement to payments shall, notwithstanding § 223, Paragraph 2, be reviewed at the time of occurrence of the insured event.

Article 3

Amendment of the Victims Assistance Act

The Victims Assistance Act, Federal Law Gazette No. 183/1947, last amended by the Federal Law, Federal Law Gazette I No. 16/1999, shall be amended as follows:

1. § 1, Paragraph 1, Item e shall read as follows:

"e) have been proven to have been confined for political reasons for a minimum of one year, in cases where the confinement involved particularly severe physical or mental suffering, a minimum of six months, or have suffered a kind of restriction of liberty as defined in § 1, Paragraph 2, Item i of a minimum of one year."

2. In § 1, Paragraph 2, Item f, the expression "after completion of six years of age" *shall be deleted.*

3. § 4, Paragraph 6 shall be deleted.

4. § 5a, Paragraph 2, first sentence shall read:

"Persons as defined in Subparagraphs 1 to 6 of § 3, Paragraph 1 of the Federal Law on Nursing Allowance (BPGG) who emigrated during the time and for the reasons stated in § 500

of the General Social Security Act (ASVG), Federal Law Gazette No. 189/1955, shall upon application and under the other preconditions set forth in the Federal Law on Nursing Allowance (BPGG) be entitled to a monthly benefit corresponding to the respective amount of a nursing allowance of categories 1 to 7, provided their habitual residence for reasons of such emigration is abroad."

5. § 11, Paragraph 14 shall read:

"(14) The entitlement to a pension shall also exist if the right to being issued an official certificate does not exist or has not existed exclusively for lack of Austrian citizenship after April 27, 1945."

6. § 18, Paragraph 8 shall read:

"(8) Victims identification documents which have been awarded by way of indulgence because the victim had not completed the age of six years at the time of the forced emigration shall be deemed as awarded by way of legal title pursuant to § 1, Paragraph 2, Item f, as of the entry into force of the present Federal Law."

7. § 18, Paragraph 9 shall read:

"(9) Official certificates pursuant to § 4, Paragraph 6 shall be deemed as official certificates pursuant to § 1, Paragraph 1, Item e or § 4, Paragraph 5, as of the entry into force of present Federal Law."

8. § 18, Paragraph 10 shall read:

"(10) If applications for the granting of payments pursuant to § 5a, Paragraph 2 and § 11, Paragraph 14 are being filed within one year of the entry into force of the present Federal Law, payments shall be granted as of the time of fulfillment of all preconditions, however, as of the entry into force of present Federal Law at the earliest. Payments granted for the period prior to the entry into force of the present Federal Law pursuant to § 5a, Paragraph 2, shall remain unaffected."

9. The former Paragraph 8 of § 18 shall be renamed Paragraph "(11)."

10. To § 19 the following Paragraph 7shall [*sic*] *be added:*

"(7) § 1, Paragraph 1, Item e, Paragraph 2, Item f, § 5a, Paragraph 2, first sentence, § 11, Paragraphs 14 and 18, Paragraphs 8 to 11, as amended by the Federal Law, Federal Law Gazette I No. .../... as well as the deletion of § 4, Paragraph 6 shall enter into force on the day announced by the Federal Government pursuant to § 44 of the General Settlement Fund Law, Federal Law Gazette I No. Xxx/2001.

No. 03-500

IN THE

Supreme Court of the United States

REPUBLIC OF AUSTRIA and
ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Petitioners,

-against-

DORIT WHITEMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a summary order of the Second Circuit simply remanding for development of an evidentiary record and to make findings as to predicate facts is ripe for review,

a. Where Petitioners, the Republic of Austria and its instrumentality ("Austria"), invoked purported "expectations of absolute sovereign immunity" from restitution claims involving Austria's commercial activities *after* World War II and continuing to date, as well as Austrian Holocaust-era conduct, and urged that the commercial activity and expropriation exceptions to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 et seq. (the "FSIA"), were inapplicable; but where, in response:

b. Respondents demonstrated through uncontroverted documentary evidence – including formal statements of the President, the Secretary of State and the Senate, a Treaty and a host of Austrian writings – that Austria was not a sovereign from 1938 until 1955, and was on notice and understood, prior to and after the United States' 1952 adoption of the restrictive theory of sovereign immunity, that Austria could not have any such immunity expectation.

2. Whether this Court should review the Second Circuit's remand order, where Respondents demonstrated the applicability of the commercial activity, and expropriation exceptions to FSIA immunity, 28 U.S.C. §§ 1605(a)(2) and (a)(3), and such unrebutted proofs evidenced continuing and current commercial trafficking in stolen Jewish assets and property in the United States by Austria and its instrumentalities.

3. Whether this Court should review questions neither developed nor decided below, including the applicability of the political question doctrine to Austria's continuing and current commercial activity in the United States involving Aryanized

Jewish assets and property, where Austria's Notice of Appeal to the Second Circuit excluded review of such issues, the issues were not decided by any court below and the United States has acknowledged that its agreements with Austria have no preclusive effect on individual claims against Austria for commercial exploitation and expropriation of Aryanized Jewish assets and property.

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STATEMENT OF THE CASE

1. Petitioners ask this Court to review a garden variety summary order of the Second Circuit remanding proceedings to the district court to develop a sufficient factual record and to make findings on disputed factual claims.

Austria asserted that it had a "settled expectation of absolute immunity" from restitution claims arising out of both its post-war (and, indeed, current) commercial trafficking in Aryanized (*i.e.*, stolen) assets and property and its Holocaust-era conduct. In response, documentary evidence was submitted – including State Department minutes of a 1958 meeting between the Secretary of State and Austria's Chancellor – showing that Austria had no such expectation, but was, instead, on notice by the United States and fully understood that it did not have immunity from claims for mandated restitution.

Additionally, responding to Austria's claim that its pre-1952 conduct was excused by the 1952 Tate Letter, 26 *Dep't of State Bull.* 984-5 (May 19, 1952), in which the United States adopted the restrictive theory of sovereign immunity, a series of writings was submitted – including those of the President, the Secretary of State and the Senate, as well as Treaty provisos and admissions of the Austrian government – that Austria's sovereignty was not restored *until 1955* and, quite deliberately, it then was coupled with a restitution requirement.

These showings were not rebutted. On oral argument and again some weeks later, the Second Circuit called upon Austria and its supporting *Amicus*, the United States, to document Austria's position. The written submissions made by the United States, based on the State Department files, were devoid of documentation that Austria was entitled to invoke sovereign immunity expectations.

The Second Circuit remanded to develop a sufficient record and to make findings that would permit review of Petitioners'

claim to immunity.[1] Thus, stripped of rhetoric and fancied claims of conflicts among the Circuits, this Court is asked, prematurely, to review a simple direction that an adequate record be made to permit judicial review.

2. This case differs in several critical respects from *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *cert. granted*, No. 03-13 (2003), which pends review by this Court. *First*, Austria's sovereignty *prior to* the 1952 Tate Letter was erroneously assumed in *Altmann*, but negated here. *Second*, in *Altmann* the commercial exception to the FSIA was not invoked or considered. It is a principal predicate for the complaint herein. And, *third*, unlike here, no showing was made in *Altmann* of Austria's extensive and continuing practice of receiving, knowingly retaining and commercially trafficking, in the United States and elsewhere, in stolen Jewish assets and property.

3. The Second Amended Complaint, which Petitioners deliberately ignore, details a continuum of wrongs committed over two discrete, but related, time periods. From 1938 to 1945 Austria looted Jewish property as a precursor to annihilation of Austrian Jewry (*e.g.*, SA 7-9, 35). Austria's own Historical Commission has now confirmed those claims. *See infra*, pp. 3-4. As Justice Jackson observed, "[t]his was not the legitimate activity of a state within its boundaries, but was preparatory to the launching of an international course of aggression."[2]

After 1945, Austria (while not an independent sovereign) simply seized what remained of Jewish assets and property,

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1. The proofs relating to Austria's expectations and its sovereignty were largely presented by *Amicus Curiae*, the Austrian Jewish Community, including the Israelitische Kultusgemeinde-Wien, which for some 150 years has been the officially recognized representative of Austrian Jewry. It continues to support Respondents' position.

2. *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, June 6, 1945, *reprinted in* U.S. Dep't of State, Pub. No. 2420, *Trial of War Criminals* 6 (1945) and N.Y. Times, June 8, 1945, at 4.

including those held by its financial and business institutions, and, as a policy matter, retained and commercially used (in the United States and elsewhere) such assets and property as though they were forever Austria's. SA 17-25, 41-45, 65-67, 73. For instance, through Petitioner Osterreichische Industrieholding AG ("ÖIAG"), Austria sold in New York in 2001 interests in a partially privatized governmental entity that held Aryanized assets and property. SA 4, 37-38, 42-43.

The value of Aryanized Austrian Jewish assets has been estimated "at roughly $14 billion, of which 60 percent was never returned and never compensated."[3] The wrongs committed under the aegis of Austrians such as Adolf Eichmann, like so much Holocaust-era savagery, was of such magnitude as to defy ready comprehension. Justice Jackson's observation is apt: "The magnitude of this planned reversion to barbarism taxes the civilized imagination and the cruelty of its execution taxes credulity."[4] Four illustrations will facilitate comprehension.

(i) Defendant Dorotheum has for over a century been the Austrian-owned auction house, gallery and financial institution. In and after 1938, Hitler, Goering, Eichmann and their minions used the Dorotheum as the principal receiving and disposal point for art, antiques and other valuables seized

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3. Michael J. Bazyler, *Holocaust Justice* at 108 (New York University Press 2003) (citing Kenneth Timmerman, *Austria Confronts Its Dark Past (special report)*, Insight on the News, Aug. 12, 2002, at 24). Gestapo records indicate, according to Austrian Historical Commission Member Robert Knight, that, *at the time of the Anschluss*, the total value of looted Jewish properties was $1.2 billion, using the official *1938* exchange rate. Robert Knight, *Restitution and Legitimacy in Post-War Austria, 1945-1953* at 413-14 n.10 (Leo Baeck Institute 1991).

4. Justice Robert Jackson, Introduction to Whitney R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* xxxi (Southern Methodist University Press, 1954).

from Austrian Jewry.[5] It likewise has been documented that, *after* war's end, the Dorotheum continued trading in Aryanized or looted valuables that mysteriously surfaced in its possession, ranging from Schiele paintings to the Rothschild china to priceless Bloch-Bauer porcelains. SA 44-45, 48-49, 218-35, 552-86. And Dorotheum records show that those Aryanized valuables were offered for sale in catalogues distributed in the United States and in Dorotheum-"partner" entities located in New York and California. SA 67-68, 221, 580. Thus, on December 4, 2002, the Dorotheum again offered an Aryanized Schiele painting for sale in its US-distributed catalogues and through its US-"partner" galleries. SA 552-86.

(ii) The family of Respondent Kurt Schindler owned property, including a shop and factory that was Aryanized. After war's end, restitution was sought. Instead, at the behest of the Austrian authorities, and because of its profitability, the facility was transferred to Austria's State-owned Tobacco Monopoly (Austrian Tabak), which conducted commercial activity in the United States. The refusal to make restitution was so flagrant that, in annexes to the 1955 Austrian State Treaty (that conferred upon Austria independence and restored its sovereignty), restitution or compensation to the Schindler family was mandated. In 1996, ÖIAG received Austria's interest in Austrian

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5. The Austrian government's own Historical Commission in its Final Report issued in 2003 confirmed the Dorotheum's role as follows:

> In July 1938, the State Police in Austria were empowered to auction moveable property which had been confiscated from Jews. The sale of the more valuable objects usually took place by way of the Dorotheum auction house. Household goods were also put up for sale. The involvement of the Dorotheum – which had acquired a monopoly in the *Ostmark* – in the expropriation of property can be seen substantially in the sale of effects at all stages of persecution, with the exception of the final one of murder.

Final Report p. 5, available at http://historikerkommission.gv.at/english-home.html.

Tabak with instructions to privatize, which was completed in 2001. Austria pocketed the profits and refused to provide restitution or compensation. SA 13-17, 1412.

(iii) Hertha Field fled to the United States after enduring the horrors of the concentration camps and became a U.S. citizen. Her father, Dr. Weiss, a prominent Viennese Jew who had attained high honors under the Emperor, was murdered before her eyes. After the war, she claimed the proceeds of his insurance policies. In 1998, the New York State Banking Department formally confirmed the existence of five policies issued on the life of Dr. Weiss. The policies were transferred, together with the insurer entity (which had been taken over by Austria), to Defendant Raiffeissen Zentralbank Österreich AG, which operates a New York-licensed banking facility. No payment has been made to this day. SA 51-54.

(iv) Soon after war's end, Austria seized major enterprises, ranging from international banks to the Defendant industries that once were part of the notorious Nazi complex, Hermann Goering Werke, together with their accumulated assets (including those confiscated from Austrian Jewry). In the ensuing post-war years and continuing to date (during which time they conducted, and continue to conduct, business in the United States) Austria has "privatized" many of those enterprises, retained the proceeds and refused to make redress. SA 37-40. As recently as February 2001, Petitioner ÖIAG, a wholly-owned instrumentality of Austria, offered for sale and sold interests in one of the partially privatized entities through a New York investment banking firm. SA 37, 42-43.

Importantly, the documented averments of the Second Amended Complaint respecting the "economic damage done to Jews" have now been confirmed by the Austrian government's own Historical Commission. Final Report at 2-3. Literally thousands of Jewish-owned businesses, banks, real estate holdings, leaseholds and tenancies were Aryanized, as found by Austria's own Commission. *Id.* at 3-5.

Austrian Restitution laws, enacted at the insistence of the United States, while on their face seemingly sympathetic, were riddled with loopholes. SA 17-23. Their effectuation was further thwarted as a consequence of a Cabinet compact (only recently unearthed) under which the Austrian government committed itself, soon after war's end, to impede by all possible means restitution to the Jews.[6]

Expressed revulsion by the United States, at the blatantly anti-Semitic and neo-Nazi behavior of successive post-war Austrian governments spurred the United States' determination to compel restitution and to insure that Austria could have no expectation of immunity from individual restitution claims, as manifested under Articles 25 and 26 of the 1955 State Treaty. *See infra*, pp. 8-17.

REASONS FOR DENYING THE PETITION

Each of this Court's decisions relied upon by Petitioners to support claimed sovereign immunity – from *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812) to *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983) – presented two crucial elements absent here: (1) the expectation of immunity by (2) a friendly sovereign.

As the District of Columbia Circuit recognized in *Joo v. Japan*, 332 F.3d 679, 684-85 (D.C. Cir. 2003) and as the Ninth Circuit held in *Altmann*, 317 F.3d at 965-67, the historical evidence, as reflected in documents ranging from a Treaty to official U.S. and Austrian Government records, sets Austria apart, particularly in the context of restitution claims.

Here, the Second Circuit was presented with documentary evidence that Austria had no expectation of immunity for restitution claims and that it was not a sovereign until years

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6. Dokument 17, Protokoll 132 (Nov. 9, 1948) *quoted in* Robert Knight, *Ich bin dafür die Sache in die Länge zu ziehen* 146 (Böhlau, Vienna 2000) (literally: "I am in favor of dragging the matter out"). *See* discussion *infra*, pp. 12, 15 and SA 21-26.

after the 1952 Tate Letter confirming the United States' adoption of the restrictive theory of immunity.

Twice Austria and its *Amicus*, the United States, were directed by the Second Circuit to rebut that showing and twice they could not do so. Nonetheless, the Second Circuit felt obliged to insure that a complete record was presented and its order, here sought to be reviewed, simply directed remand for the purpose of making that record. *See United States ex rel. d'Esquiva v. Uhl*, 137 F.2d 903 (2d Cir. 1943). That determination is not the proper subject for review.

I. The Second Circuit's Interlocutory Order Does Not Warrant Review At This Juncture.

Austria's attempt to secure review of the Second Circuit's interlocutory order, which itself was jurisdictionally predicated upon a non-appealable interlocutory discovery order of the district court, does not warrant review.[7] *Pac. Union Conference of Seventh-Day Adventists v. Marshall*, 434 U.S. 1305 (1977). There, this Court denied issuance of the writ where, as here, the interlocutory discovery order of the district court "was not even appealable to the Court of Appeals under 28 U.S.C. § 1291, to say nothing of being appealable to this Court." *Id.* at 1306.

Likewise, remand for the development of the facts and an evidentiary hearing does not warrant review, either of that determination or the underlying merits. *See Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 755 (1986) (no appellate jurisdiction where the judgment is not final

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7. The district court, like the Second Circuit, did not issue any ruling on the merits of Austria's immunity claim. It simply ordered jurisdictional discovery in accordance with this Court's holding that jurisdictional defenses present a threshold issue, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Verlinden*, 461 U.S. at 493-94, and established Second Circuit precedent. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 139 (2d Cir. 2001); *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 747-48 (2d Cir. 2000).

and the case is remanded for further development of the facts); *Brhd. of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

II. Austria Was Specifically Advised By The United States That It Would Have No Expectation Of Immunity For Restitution Claims. Moreover, It Was Not A Sovereign Entitled To Assert Immunity For Pre-1952 Acts.

A. Austria's Expectations.

As late as *1958* – years after the 1952 adoption of the restrictive theory of immunity and years after the United States by Treaty declared Austria "re-established" as "a sovereign, independent and democratic State," (SA 957-86) – then Secretary of State John Foster Dulles cautioned Austrian Chancellor Julius Raab that he could not, as proposed by Austria, purchase "an end to Jewish claims"; neither would the United States Government "prevent private persons from advancing [restitution] claims or arguing with the Austrian Government." SA 990-91.[8] Deep disgust on the part of the United States, resulting from Austria's consistent post-war record of deliberately thwarting restitution, coupled with unabated anti-Semitism, provided the background for the United States' caution to Austria against any immunity expectations.

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8. Accordingly, in the 1959 official Exchange of Notes between the United States and Austria confirming agreements reached in May 1958, Austria was required to omit the clause it had sought to incorporate waiving its compliance with Article 26 of the 1955 State Treaty mandating restitution. Indeed, the United States Note, in paragraph 3, added that "nothing in your note affects the provisions of the second sentence of paragraph 1, Article 26 of the State Treaty in respect of any future measures." The sentence referred to was a Treaty undertaking by Austria that, "where return or restoration is impossible," Austria would accord "compensation." SA 981.

1. The Holocaust Years. It defies credulity to suggest that Austria, a war time enemy of the United States, could have had any expectation of immunity for its barbarism. In *Schooner Exchange*, Justice Marshall made clear that only a "foreign sovereign with whom the government of the United States is at peace . . . and demeaning herself in a friendly manner, should be exempt from the jurisdiction of [the United States]." *See Schooner Exchange*, 11 U.S. at 147; *Berg v. British & African Steam Nav. Co.*, 243 U.S. 124 (1917); *see also Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *The Santissima Trinidad*, 20 U.S. 283, 354 (1822). Certainly during the war Austria could not have had any such expectation.

To illustrate, on January 5, 1943, Austria was warned in the *London Declaration*, 8 *Dep't of State Bull.* 21 (Jan. 5, 1943), that all forced "transfers of, or dealings with property, rights and interests of any description whatsoever" in the Axis countries were subject to invalidation. SA 865. That warning was repeated a few months later in the *Moscow Declaration*, in which the U.S. and its allies declared that they were not bound by any changes effected in Austria since March 15, 1938, and Austria was reminded that it has "a responsibility, which [it] cannot evade, for participation in the war on the side of Hitlerite Germany." SA 870.[9] *See also Gold Declaration of February 22, 1944*, 9 Fed. Reg. 2096 (Feb. 23, 1944). And, the United Nations, following the 1944 Bretton Woods Conference, added its voice by demanding the return of all stolen assets within "occupied territory", including currency, art, securities and other so-called moveables "looted by the enemy." SA 872-76.[10]

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9. The *Moscow Declaration* was not without flaws. Thus, its suggestion that Austria was "the first victim of the Nazis" has *to this date* been the excuse Austrian politicians and many Austrians use to justify self denial.

10. For an apt summary of then-current judicial thinking, *see Weiss v. Lustig*, 185 Misc. 910, 911 (N.Y. Sup. Ct. 1945). By contrast, we have never been cited to any authority to support the notion implicit in

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In 1949, at a time when the absolute theory of immunity for non-commercial activity held sway, the State Department was asked by counsel in then pending litigation to advise the Second Circuit as to the United States' position on judicial resolution of Holocaust-era claims. The responsive letter of Jack B. Tate, Acting Legal Adviser of the State Department, states the Government's policy with respect to restitution for Holocaust-era wrongs.[11] It also provides clarity as to what expectation Austria might reasonably have had, even post-war, as to its immunity for Holocaust-era restitution claims.[12]

In the "Bernstein letter," named after the litigation in which it was submitted, *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), the Executive branch set forth a broad policy in favor of compelling "restitution of all Nazi-era forced transfers in the countries and peoples subject to their control" and relieving "American courts from *any* restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Id.* at 376; *State Department Release No. 296* (1949), *reprinted in* 20 *Dep't of State Bull.* 592-93 (May 8, 1949)(emphasis added). Omitted, however, from the version published in the *Bernstein* decision and later cases, were critical paragraphs of the April 13, 1949 Bernstein Letter and, importantly, the separate Official State Department statement issued two weeks later. 20 *Dep't of State Bull.* 592-93 (May 8, 1949).

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Austria's submission that it knew about, cared about or relied upon immunity at or preceding war's end – with world conquest as its goal, it cared not a whit.

11. *See Verlinden*, 461 U.S. at 486; *see also Ex Parte Republic of Peru*, 318 U.S. 578, 586-87 (1943); *Hoffman*, 324 U.S. at 35.

12. Austria's "expectations" claims depend on what the Executive might have been expected to recommend at the time of the underlying acts. *See Landgraf*, 511 U.S. at 280; *see also Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 (1997); *Verlinden*, 461 U.S. at 486.

The omitted portions of the Bernstein letter were a lengthy series of citations to prior consistent U.S. Government statements and proclamations – including, among others, the 1943 London Declaration, the 1944 Gold Declaration, the 1945 Potsdam Agreement and the 1947 Military Government Law No. 59 on Restitution of Identifiable Property (all of which demanded restitution) – and which Mr. Tate cited as reflecting the established "policy of the Executive that "[t]his Government has consistently opposed the forcible acts of dispossession . . . practiced by the Germans on the countries or people subject to their controls " and for the restitution of which American courts were to be relieved from "any restraint upon their jurisdiction to pass upon the validity" of such acts. *Compare id.* at 593 *with Bernstein*, 210 F.2d at 376; App. 3a-7a.

Thereafter, on April 27, 1949, the State Department declared:

> The [Bernstein] letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that *it is this Government's policy to undo forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*[13]

13. 20 *Dep't of State Bull.*, 592-93 (May 8, 1949)(emphasis added). Petitioners have argued that, because the Bernstein litigation turned on an Act of State defense, the Bernstein letter is likewise limited. That myopic view ignores the Bernstein letter as a whole, its citation of precedents that make clear that it reflected an established policy of the

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The Bernstein Letter and the later State Department Policy statement were, however, not alone in their post-war expression of United States policy during the period that the absolute theory of immunity applied.

Earlier (on March 4, 1949), Judge David Bazelon, then Assistant Attorney General and Director, Office of Alien Property, advised that, following consultation with the State Department and relying on some of the same precedents cited in the Bernstein letter, the Department of Justice's Office of Alien Property had concluded that no validity should be accorded Holocaust-era confiscatory and discriminatory acts and decrees. App. 1a-2a.

Thus, in and before 1949, State and Justice were as one in expressing the policy affording Austria no expectation whatsoever of immunity for Holocaust-era acts.

2. 1945 To Date. The war had barely ended when Austria demonstrated that little had changed. Recently unearthed Austrian Cabinet minutes reveal that on November 9, 1948, following a particularly vituperative assault upon Jewry and their rights by various Cabinet Ministers, the Interior Minister, Oskar Helmer proposed, and the Chancellor and Cabinet acquiesced, in adoption of Austria's policy to delay for so long as possible any restitution to Jews. *See* note 6, *supra.* And that was consistent with official Austrian policy and rhetoric of the time and thereafter.

In practical terms the post-war quest for restitution was "a competition" in which the "victims of 'Aryanization' faced

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Executive to mandate restitution and, importantly, the State Department's above-noted Statement, which was not limited to (or even part of) the litigation. Moreover, as Justice White noted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 n.18 (1976), the urged distinction is one without a difference where, as here, commercial activity is cited as a jurisdictional predicate. *See also Hoffman*, 324 U.S. at 35-36.

the 'gainers'" who ran across the economic and political post-war spectrum. SA 263. The choice, insofar as Austria's leadership was concerned, was simple when it came to Jews. Austria's first post-war Chancellor and later President, Karl Renner, who had enthusiastically endorsed the Anschluss and the "incorporation" of the Sudetenland, proclaimed as early as August 29, 1945:

> I think that in dealing with the Nazi problem we are getting into a critical situation . . . at the time of *Anschluss* all these little officials, these small citizens and businessmen did not have any far-reaching aims at all – at the most to do something to the Jews. . . .

SA 266. And again in demanding legislation for the return of property of his own Socialist Party, Renner stressed the "Realpolitik" of post-war Austria, stating "[a]fter all it would be quite incomprehensible if every small Jewish salesman or hawker is compensated for his loss" while his political party was not first in line. SA 267. Successive post-war Austrian governments acted, as a matter of official policy, to evade restitution, while avoiding "triggering 'all sorts of claims,' in particular from the Jews." SA 268. The old anti-Semitic refrains reemerged. Austria's Foreign Ministry addressed restitution as something that Austria should not legally be required to make as the "First Victim" of Nazism, but cautioned that Jewry not be aroused because "[i]t is not without reason that Jewry has been termed the fifth world power, on whose enmity Hitlerite Germany foundered." SA 269-70.

The American Military Occupying authorities were forced repeatedly to intervene, demanding, for example, the rescission of a law that undermined Jewish property rights. SA 270. The Austrian response though literally correct, "became a by-word for corruption" by officialdom. SA 270-71. Thus, the much-touted Third Restitution Law – which was premised on the 1943 *London Declaration* – was so replete with loopholes and discretionary enforcement mechanisms that it came to be viewed

as actually "favourable towards the 'Aryanizer'." SA 274-75. "Austria" argued it "had nothing to make good since it had done nothing wrong." SA 273.

It was against this background of official Austrian obstruction to restitution that negotiations began in 1947 on what became the 1955 State Treaty. And those discussions, as well as the restitution process, were soon complicated, primarily by East-West tensions, but also by a discernible Austrian tilt in favor of "former" Nazis. The voting rights of "less implicated Nazis" were restored and they soon became a political force to be reckoned with. SA 280-81. Alfons Gorbach, later Austria's Chancellor, proclaimed that his sympathy lay more with the "less implicated Nazis" and the ex-soldiers than with Jewish refugees:

> Nowhere in the events of recent years was there so much genuine decency, so much self-denying fulfillment of duty as with the soldiers of this war. . . .

SA 280. And, official Austrian Cabinet Minutes reveal that, on January 14, 1947, Chancellor Leopold Figl articulated the unchanged governmental anti-Semitism, damning restitution with the statement, "The Jews would like to become too rich too quickly." SA 1009. Vice Chancellor Schärf, later Austria's Federal President, went him one better: "Through the Jews entire regions in Austria have been ruined." SA 1019.[14]

In 1952, when the U.S. High Commissioner refused to approve a government-supported amnesty declaration for Austrian Nazis, the response was an anti-Semitic attack by Austrian Chancellor Raab on the "influence" of "emigrants," meaning naturalized American citizens of Austrian Jewish

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14. The virulent rhetoric has changed only slightly in recent years. Thus, Jörg Haider, whose party has been and is the essential coalition partner governing Austria in recent years, has publicly expressed his admiration for the SS, certain Hitler policies, and the like. *Austria: Review*, Europe Review World of Information, Oct. 20, 2003, at 1.

origin employed in the U.S. High Commissioner's office. And the attack was reiterated by the Austrian Cabinet when, in September, 1952, the High Commissioner objected to Nazis being compensated at the expense of their victims.[15]

American condemnation was manifested in stern warnings from Government officials. In July 1952, the State Department publicly proclaimed that "it is greatly disturbed to have received reports" on Austrian efforts to grant amnesty to and even promoting implicated Nazis, and forcing the reopening of restitution judgments and undoing restitution decrees.[16] United States vetoes of these Austrian actions were threatened and only their prospect reined in Austria's anti-Semitic extremism. *Id.*

Restitution was anathema.[17] Evasion and delay had long been the official Austrian policy as now is finally clear from Austria's official Cabinet Minutes. *See* note 6, *supra.* Amid cries that the Aryanizers had acquired Jewish property "out of altruistic motives," legislation crippling restitution was proposed

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15. *Vienna Is Critical of U.S. "Emigrants"*, N.Y. Times, June 18, 1952, at 14; *Austria Now At Odds With All The Powers*, N.Y. Times, Sept. 7, 1952, at B7.

16. *Austrian Amnesty Facing Veto by U.S.*, N.Y. Times, July 29, 1952, at 6; *see also* SA 280-81.

17. Restitution there was, but it was reticent, spasmodic and incomplete, as now confirmed by Austria's own Historical Commission. Republic of Austria Historical Commission Press Release, July 4, 2002, at 5-6. However, as the Preliminary Report discloses, available *at* http://www.historikerkommission.gv.at/english_home.html. (p.11), as does the Final Report, "non-fulfillment" of even that obligation was evident. Indeed on January 17, 2001, Austria acknowledged, in a Joint Statement with the United States, representatives of Austrian industry, Jewish groups, and plaintiffs' Counsel, that "taking into account all measures of restitution, compensation and social welfare benefits for victims of national socialism that were carried out by Austria in the past, that there were . . . gaps and deficiencies in such measures."

by the majority Parliamentary parties in July 1950. American Occupying Authorities were outraged, the American attaché stating, "if the Austrians were permitted to get away with so brazen a violation of one of the [proposed] Treaty terms it would serve as an indication of Austrian readiness to violate any other provisions of the Treaty without compunction." SA 280-81.

As negotiations for the Treaty threatened to collapse, Austrian Finance Minister Margaretha complained to American officials that Austria had "been told by the occupying powers that they couldn't have a treaty unless they passed the [restitution] law and now they [still] have no treaty and only a law which creates injustices." SA 280-81. Other Austrian officials commented "the number of Jews killed was relatively small," and American demands for restitution were "blackmail." SA 284-85. The Cabinet, though still adamant, cautioned secrecy, noting that tens of thousands of former Austrian Jews in America had to be reckoned with. SA 1023-36.

Against this background the 1955 State Treaty restoring Austria's sovereignty was adopted (*see* discussion *infra*, pp. 19-20). First, however, the State Department, responding to a request by Senator Herbert H. Lehman (echoing Senate Foreign Relations Chairman Alexander Wiley's prior demands), represented that it had already made known to Austria the United States' view "as to the wisdom of concluding a satisfactory agreement" on restitution claims "before the state treaty is presented to the Senate for ratification." 101(5) Cong. Rec. 6285-86 (May 13, 1955); *see Pay Jews' Claim, Austria Is Advised*, N.Y. Times, Mar. 9, 1954, at 8. Because Austria continued to stonewall, Austria, unlike Germany, was in Article 26 (as well as in Article 25) of that Treaty required to undertake an explicit obligation of restitution. SA 979-82.

So much, we submit, for the notion that Austria had any expectation of immunity prior to the 1952 Tate Letter. If any doubt at all remained Secretary Dulles laid it to rest in his

meeting with Austria's Chancellor in May 1958. *See supra*, p. 8.

B. Austrian Sovereignty.

The *sine qua non* of sovereign immunity is that the claimant be a sovereign (*Morgan Guar. Trust Co. of New York v. Republic of Palau*, 924 F.2d 1237 (2d Cir. 1991); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991)) at the time of the acts complained of (*Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)). However, Austria was not a sovereign from the March 1938 Anschluss until the 1955 Austrian State Treaty was ratified, granting her sovereignty and independence (well after the *1952* adoption of the restrictive theory of immunity). The point is indisputable.

On December 21, 1953, then Austrian Chancellor Julius Raab, in a formal communiqué, asserted lack of sovereignty to justify refusing restitution claims for heirless Jewish property:

> Answering this reproach made in the reply of the Jewish committee that the Government had changed its policy, the communiqué said that the Austrian Finance Minister had already made clear that his country could not entertain restitution claims "since the damages inflicted in Austria were done by a foreign power after the occupation of this country."
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> . . .
>
> *In view of the fact that she is not fully sovereign* and has therefore been unable to fix a definite date by which restitution claims must be filed . . . , it has been impossible, the communiqué stated, for Austria to do more.

Austria in Denial of Jewish Charges, N.Y. Times, Dec. 22, 1953, at 16 (emphasis added).

Austria claims that, from 1938 to 1945, it was an occupied nation (Pet. 3). Former Austrian President Kurt Waldheim – the *éminence grise* of Austria's current government – agrees that

Austria's "sovereignty" ended in 1938 with its "occupation by German troops." Kurt Waldheim, *The Austrian Example* 44 (Ewald Osers trans., Weidenfed and Nicholson 1973). Similarly, on March 27, 1939, the Secretary of State notified the Attorney General in connection with litigation involving the sequestration of assets that "the United States recognizes that Austria has ceased to exist as an independent sovereign State and has been incorporated in the German Reich, and that Germany exercises *de jure* sovereignty over the territory of the former Republic of Austria." *See* Marjorie M. Whiteman, 2 Dig. Int'l L. 328 (1963) (quoting March 2 memorandum of Ralph Snowden Hill, quoting letter of Secretary of State Hull, dated March 27, 1939).[18]

With war's end Austria was not afforded sovereignty or independence. Instead, until 1955, Austria was divided into four occupied zones. As stressed by the United States in *United States v. Portrait of Wally*, No. 99 Civ. 9940, 2002 WL 553532, at *8 (S.D.N.Y. April 12, 2002), "[u]ntil the signing of the Austrian State Treaty in 1955, the allies would 'sit in judgment' of the Austrian government, in that all official acts required their approval." *Id.* While the trappings of governmental powers existed, final authority was in the hands of the Allied Powers. *Id.*; *see also Austria in Denial of Jewish Charges*, *supra*. In the vast Soviet zone, sweeping changes were fashioned without any

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18. In the ensuing years, the mixed messages emanating from the Executive caused the Second Circuit to comment that it was unable to resolve with any degree of clarity Austria's status. *See Uhl*, 137 F.2d at 906-07; *see also United States v. Schwartzkopf*, 137 F.2d 898 (2d Cir. 1943). *Cf. Land Oberoesterreich v. Gude*, 109 F.2d 635 (2d Cir. 1940), *cert. denied*, 311 U.S. 670 (1940). However, it was clear that whatever the *de jure* status of Austria may have been following the Anschluss, it lacked independence. Ludwig Adamovich, *Handbuch des Österreichischen Verfassungsrechts* 35 (1971)(President of Austria's Constitutional Court concluding that Austria lacked sovereignty prior to 1955). And, Austria which was soon cast in the role of an enemy, *see Uhl*, 137 F.2d at 904, was reminded in the Moscow Declaration "that she has a responsibility, which she cannot evade, for participation in the war at the side of Hitlerite Germany . . .". SA 870.

prior consultation whatsoever. SA 950-51. Likewise, the United States exercised veto power. *See, e.g., Austrian Amnesty Facing Veto by U.S.*, N.Y. Times, July 29, 1952, at 6.

The sovereignty notion also ignores the 1955 State Treaty and its expressed affirmation that its purpose and intent was the "re-establishment" of Austria "as a sovereign, independent and democratic state." SA 958. And, during ratification, President Eisenhower, Secretary of State Dulles and the Senate stated that the purpose and effect of the Treaty was to re-establish Austria in 1955 as a sovereign, following a 17-year lapse in sovereignty.

Article 1 of the 1955 State Treaty "re-established" Austria as "a sovereign, independent and democratic State." SA 958. Articles 25 and 26(1) directed that Austria would thereafter make full restitution (a) to all nationals (individual or corporate) of any of the United Nations (a defined term including all persons that had been treated as enemies in Austria during the war), and, importantly, (b) to all victims of religious or other persecution of all assets and properties seized, whether through legal artifice or force, on and after March 15, 1938. SA 979-82.

In submitting the Treaty to the Senate for ratification, on June 1, 1955, President Eisenhower stressed the Treaty's purpose and effect:

> The Treaty provides for the termination of the occupation and the reestablishment of Austria, within the borders as they existed on January 1, 1938, as a sovereign, independent and democratic state . . . .

SA 918-19. Secretary Dulles, in his Senate testimony urging ratification, added:

> Austria lost her independence before we were in the war, and now through the struggle . . . . we are in a position to give Austria back her independence.

SA 933. Secretary Dulles also stressed the Treaty mandate that "Austria will make restoration or provide compensation to

victims of Nazism, who were largely those of Jewish faith." SA 926.

The Senate Foreign Relations Committee Report urging ratification, reinforced these understandings, stating that the "main purpose" of the Treaty was to "establish Austria as a sovereign, independent, democratic state," noting "Austrian independence came to an end on March 13, 1938, when Nazi troops moved in and Hitler proclaimed its union with Germany in the so-called Anschluss. The Senate added:

> [T]he Austrian State Treaty . . . restores Austria to the status of independence it occupied before the Anschluss.

SA 956. Finally, the Senate stressed " Under article 26, property of which these [persecuted] individuals were deprived will be returned . . . .Where return or restoration is impossible, compensation will be granted ." SA 954.

And Austria's own historical view was aptly stated by Austrian Historical Commission Member Robert Knight: "[t]he State Treaty brought Austria the restoration of sovereignty and the departure of Allied Authorities." SA 287. *Accord* Adamovich, *supra*, at 35; Waldheim, *supra*, at 186.

The Legislative and Executive branches definitively spoke to Austrian sovereignty when that issue was squarely addressed in 1955: Austria was not a sovereign from 1938 to 1955. That judgment controls. *Jones v. United States*, 137 U.S. 202, 212 (1890), *quoted with approval in Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 311 (1918).

C. The Position Of The United States.

The Legal Adviser of the State Department joined with the Justice Department in appearing *Amicus* in the Second Circuit in support of Austria's application. On oral argument, the Court called upon them, in view of the above-noted showing, to produce any materials from the State Department's files that

would bear upon Austria's status from 1938 to 1955. In response, the United States was unable to point to a single document at variance with the foregoing.

Instead, the Legal Adviser and the Justice Department urged a distinction between Austria's retention of its "*de jure*" sovereignty during the Anschluss (on the theory that the United States rejected the legitimacy of the Anschluss) and "the State Department's position that 'Austria is *de facto* a part of Germany' ", adding that the Secretary of State, when asked contemporaneously to "clarify publicly the United States' position with respect to Austria's status, he responded that the United States' various steps with respect to Austria had been taken purely as a practical response to the *de facto* circumstances of effective German control, and did not signify *de jure* recognition of the Anschluss."

The Government thereby, unwittingly or not, conceded the point at issue here. Austria's inability to exercise its "*de facto*" sovereignty, *e.g.*, the "powers to declare and wage war, to conclude peace, to make treaties," *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), means that Austria was "not completely sovereign" and was not "independent", and therefore not entitled to any immunity as a sovereign until it was "re-established" as a "sovereign, independent and democratic state" under Article 1 of the 1955 State Treaty.[19] *Id.*

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19. "Independence" – *i.e.*, the absence of a "supreme authority above it [the asserted sovereign] that can interfere with its freedom of action within its realm", Steven Lee, *A Puzzle of Sovereignty, Sovereignty Either Is Or Is Not*, 27 Cal. W. Int'l L.J. 241, 252 (1997) – has long been recognized as the *sine qua non* of sovereignty. *See* Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. Pa. L. Rev. 1127, 1139 (1961); *Matimak Trading Co., v. Khalily*, 118 F.3d 76, 80 (2d Cir. 1997) ("courts have focused on whether the foreign state was recognized by the United States as a 'free and independent country'"); *see also Morgan Guar.*, 924 F.3d

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III. The FSIA Commercial Exceptions, And The Expropriation Exceptions, Apply To The Conduct Documented In The Second Amended Complaint. To The Extent Retroactivity Is Implicated By Austria's Continuing Conduct, This Court's Criteria Are Amply Met.

The courts below did not reach the issues attendant to applicability of the three distinct FSIA commercial exceptions, based upon (1) Austria's commercial activity conducted in the United States, *or* (2) its acts performed in the United States in connection with commercial activity abroad, *or* (3) acts committed outside the United States in connection with commercial activity abroad that caused a direct effect in the United States. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993). If one of these exceptions is found to apply, "the foreign sovereign is stripped of immunity, and, pursuant to 28 U.S.C. § 1330(a), jurisdiction exists in the district court. *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 148 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

The rationale of this established jurisdictional principle, expounded by Chief Justice Marshall in *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. 904, 907 (1824) and reiterated by this Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976), is that:

> In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns.

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at 1243. Courts have long recognized the difference between the concept of legal existence and the capacity to sue or be sued. *Klinghoffer*, 937 F.2d at 48-49; *see also Land Oberoesterreich*, 109 F.2d 636-37. By any test, Austria was not "independent" from the time of the Anschluss in 1938 until the 1955 State Treaty.

> Instead, they exercise only those powers that can also be exercised by private citizens.[20]

Since the courts below did not address the commercial exception averments of the Second Amended Complaint (*see* SA 40-45) we need not dwell upon them here. Two illustrations suffice. The Dorotheum, owned by Austria, has for decades offered for sale and sold antiques, art objects and like valuables in the United States, both through catalogues and "partner" galleries. It was a principal vehicle employed by the Nazis in disposing of Aryanized objets d'art. In recent years, for example, stolen Schiele paintings, the Rothschild china and the Bloch-Bauer porcelains have "mysteriously" resurfaced in the hands of the Dorotheum and been offered for sale and sold through its customary channels, including those in the United States. SA 552-86. Such activity was repeated as recently as last year.

Another vehicle is Petitioner ÖIAG, the wholly-owned and controlled Austrian instrumentality which asserts sovereign immunity here. For the last several decades ÖIAG has been a principal vehicle through which Austria owns and operates its international commercial enterprises and controls their privatization. In February 2001 ÖIAG offered for sale in New York, through investment banking firms, interests in ÖIAG-held Austria Telekom, valued at approximately $1 billion, and filed Form F-1 and other required documentation with United States

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20. That principle applies with equal force "when a government becomes a partner in any trading company, [since] it [then] divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen." *Planters' Bank*, *supra*. The point is apposite here since, following the war, Austria succeeded to the ownership of most of its major financial and industrial concerns (which held Aryanized assets and property and virtually all of which on a regularized basis engaged in commercial activity in the United States). Even though in recent years it embarked on limited privatizations, Austria retained a controlling interest in most of these entities (including various of the defendant companies).

regulators acknowledging that the proceeds were to be repatriated. SA 37, 42-43.

These illustrations also implicate the two distinct FSIA expropriation exceptions (28 U.S.C. § 1605(a)(3)) invoked in the Second Amended Complaint. They give rise to jurisdiction where

> rights in property taken in violation of international law are in issue *and* that property or any property exchanged for such property [1] is present in the United States in connection with commercial activity carried on in the United States by the foreign state; *or* [2] . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3) (emphasis added). Neither Petitioners nor the courts below confronted the applicability of the FSIA exceptions. Instead, because the acts complained of – even those of a recent and continuing nature – involve a continuum, often with beginnings in Holocaust-era wrongs, Petitioners maintain that they are barred by absolute sovereign immunity.

Petitioners' retrospective allusion ignores Chief Justice Marshall's counsel that when a foreign government engages in commercial activity in the United States – a claim implicated under branches of both the commercial and expropriation exceptions invoked here – "it divests itself . . . of its sovereign character" and is not immunized. *Planters' Bank*, 22 U.S. at 907; *see also Alfred Dunhill*, 425 U.S. at 695-96. Of itself, that provides a sufficient jurisdictional nexus.

However, even if one were required simply and solely to consider conduct occurring prior to the 1952 Tate Letter adopting the restrictive approach to claims of sovereign immunity (and if one were to assume that Austria then had an expectation

of absolute sovereign immunity or was, indeed, a sovereign), the result would be the same.

The FSIA (drafted primarily by the State Department) had for its purpose removing the Executive from precisely these kinds of disputes. *See Verlinden*, 461 U.S. at 487-88. Yet, if the analysis here urged by Petitioners is adopted, we are returned to the absolute theory of immunity that the 1952 Tate letter (and later the FSIA) had supposedly ended – with the outcome dependent on whether the Executive could be importuned into supporting immunity (as here has occurred) – as contrasted with the restrictive theory under which "immunity . . . does not extend to cases arising out of the foreign state's strictly commercial acts." *Id.* at 487. At the State Department's urging, Congress enacted the FSIA to bar precisely that result. *Id.* at 488. Once commercial activity conforming to one of the three commercial exceptions of the FSIA, or expropriation activity implicating specified commercial conduct is shown, "the foreign state shall be liable in the same manner and to the same extent as private individuals under like circumstances." *Id.* at 488-89 (quoting 28 U.S.C. § 1606).[21]

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21. Moreover, the notion that some inherent vice exists in permitting American courts to address these wrongs has, likewise, been addressed:

> Congress was aware of concern that "our courts [might be] turned into small 'international courts of claims[,]' . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." . . . . Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. § 1605. . . .

Verlinden, 461 U.S. at 490.

Petitioners argue, however, that at least the initial Holocaust-era conduct of Austria is excused and, perhaps, even those subsequent commercial events implicating those wrongs are immunized, because it is part and parcel of the continuing wrongs here demonstrated – *i.e.*, but for Holocaust-era Aryanization, the post-war and continuing wrongs (*i.e.*, continuing trading in stolen assets and property) would not have occurred and, therefore knowingly retaining and trafficking in plunder is licensed. The offensive nature of this assertion aside, it lacks merit.

To the extent that past conduct is implicated, it does not offend the "time-honored presumption against retroactive legislation". *Hughes Aircraft*, 520 U.S. at 940; *Landgraf*, 511 U.S. at 265-66. The FSIA exceptions do not "make unlawful conduct that was lawful when it occurred." *Hughes Aircraft*, 520 U.S. at 947 (quoting *Landgraf*). Whether viewed as a civil wrong under theories of replevin, conversion or fraud, or as one proscribed by statute (18 U.S.C. § 2314; N.Y. Penal Law §§ 165.54, 165.60 (McKinney's 1999); Strafgesetzbuch §§ 164(1), (2), Kommentar zum Strafgesetzbuch, Rz 13, Fabrizy, St. GB (2002), § 164 Rz 2), the wrong was actionable long before the 1952 Tate Letter. While the war was ongoing the United States, its Allies and the United Nations declared such conduct proscribed and proclaimed its revocability because it abridged international law, as well as Austrian law. *See Landgraf*, 511 U.S. at 281-82. Neither do the FSIA exceptions change the substance of the extant cause of action or create a new one or even provide added burdens. *Id.* at 282-83. The wrong was a wrong when committed.

The mere addition of a test for a *judicial* determination as to whether the wrong could be addressed in an American forum – as contrasted with having that same determination depend upon whether the Executive could in any given case be importuned to solicit or ignore immunity claims – adds neither a new liability or a new burden. It simply shifts

responsibility from the Executive to the Judicial branch to determine justiciability.

To repeat, since, at least 1824, it has been unquestioned law that, where a foreign government or its instrumentality engages in commercial activity in the United States and such conduct is fairly implicated in the wrongs charged, the foreign government is in no different position than a private citizen and is subject to the jurisdiction of our courts. *Planters' Bank*, 22 U.S. at 907-08; *Alfred Dunhill*, 425 U.S. at 695-96, 706. The Tate Letter did not alter that rule. All that the FSIA does is establish standards for a judicial determination as to whether the activity complained of falls within the rule.

IV. Review Of Questions Neither Developed Nor Decided Below Would Be Inappropriate.

Petitioners' Notice of Appeal to the Second Circuit circumscribed the issues sought to be reviewed, excluding the political question claim here raised (SA 46-47) and which neither the district court nor the Second Circuit adjudicated.

Because this Court does "not decide in the first instance issues not decided below," *National Coll. Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999), Austria's attempt to have this Court decide this issue in the first instance should be rejected. *See also Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253-54 (1999) (issue was not "sufficiently developed below" would not be addressed); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to decide "in the first instance an issue on which the trial and appellate courts did not focus"); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 (1996) ("[W]e do not generally address arguments that were not the basis for the decision below").

Moreover, Austria's political question defense was not even ripe for determination by the courts below. *See Verlinden*, 461 U.S. at 493-94 ("At the threshold of every action in a District Court against a foreign state, therefore,

the court must satisfy itself that one of the exceptions [the FSIA] applies"); *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 139 (2d Cir. 2001) (court must "inquire at the 'threshold of every action' against a foreign state whether the exception to sovereign immunity that the plaintiff alleges permits the exercise of federal jurisdiction."); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995)("other considerations relevant to justiciability," including the political question doctrine, were considered and rejected only after the "jurisdictional threshold" was satisfied).

Austria's political question defense is not only procedurally defective, it is also meritless. The doctrine excludes from judicial review only those cases "which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Manifestly, the judiciary has the power to interpret treaties and executive agreements, and render decisions that may affect the Executive's actions in the international arena. As this Court held in *Japan Whaling*, "courts have the power to construe treaties and executive agreements . . . and we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*; *see also Kadic*, 70 F.3d at 248-50 ("Judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.").

Indeed, Austria's argument is contrary to the *very purpose* of the FSIA. *See Verlinden*, 461 U.S. at 487-88; H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6605-06. The existence of the FSIA, the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) and the Torture Victim Protection Act, 28 U.S.C. § 1350, aptly demonstrates that Congress intended the judiciary to hear disputes founded, as here, in specie of replevin, conversion, tort or fraud. *Klinghoffer*, 937 F.2d at 49-50.

Furthermore, Austria's argument that this Court's decision in *American Insurance Association v. Garamendi*, 123 S. Ct. 2374 (2003) lends support to their argument in favor of non-justiciability is wrong. *Garamendi* stands for the long established and commonplace proposition that under certain circumstances, the President has the power to enter into executive agreements, which may, in turn, preempt inconsistent state law. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

Garamendi does not support Austria's invocation of the political question doctrine here. First, Austria advocates deference to an executive agreement that by its express terms intentionally has no preclusive effect upon claims such as here tendered. The United States has already conceded this point in a Statement of Interest filed in an analogous Austrian case:

> The agreement negotiated is not a government to government claims settlement agreement, and the United States has not extinguished the claims of its nationals or anyone else.

SA 1-44. Second, Austria improperly attempts to abridge the 1955 Treaty by using the January 17, 2001 Agreement to alter rights and obligations established under the 1955 State Treaty, which, unlike the later executive agreement, was ratified by Congress and is considered "supreme Law of the Land." U.S. Const. art. VI, § 1, cl. 2. Third, *Garamendi* has nothing to do with the FSIA, and there can be no argument that Congress "implicitly approved" (*Dames & Moore*, 453 U.S. at 680) the dismissal of the FSIA claims herein when the FSIA was enacted to place the decision as to immunity solely within

the province of the courts. H.R. Rep. No. 94-1487, *at* 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6605-06.[22]

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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22. Austria invokes (Petition pp. 20-22) the so-called GSF, which it then misstates (*id.* at pp. 3-5). This is not the proper forum to exhaustively address the GSF, which has been widely assailed (*see, e.g.*, Bazyler, *Holocaust, supra* at 108). The senior American public official, who crafted the January 17, 2001 initiative on literally the eve of his departure from office (*id.)*, admits to having, soon thereafter, been retained by heirs to the Imperial Habsburg Dynasty to file a claim that would effectively exhaust much of its funds. App. 8a-16a. When questioned as to how the Imperial Habsburgs could potentially hijack a Fund proclaimed as having been created to affect restitution to Jews, that former U.S. official proclaimed that he had "purposely made the law" broad enough to cover all "victims." *Id.* Other flaws involved exclusion of all assets, securities, leased properties, intellectual property and other so-called movables that had been Aryanized (*see generally* SA 146-59). Also, if Austria had to any extent sheltered property in an entity that it did not exclusively control – from a majority - owned privatized company, to a governmental authority, to a province or municipality, and including all private entities and individuals – restitution was forever barred and the knowing holder of stolen property was licensed to retain it. Moreover, at Austria's behest there was shamefully included a proviso barring claims of aged and infirm survivors unless the Austrian Jewish Community and others surrendered their claims.

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APPENDIX

APPENDIX A — BAZELON LETTER, MAR. 4, 1949

OFFICE OF ALIEN PROPERTY
Department of Justice
Washington 25, D.C.

Mar 4, 1949

Seymour J. Rubin, Esq.
Attorney at Law
1822 Jefferson Place, N.W.
Washington 6, D.C.

Dear Mr. Rubin:

This is with reference to your letter of December 15, 1948, concerning the question whether this Office should utilize German discriminatory decrees as a defense to debt claims asserted under section 34 of the Trading with the Enemy Act, as amended. The Department of State has advised this Office that the Government of the United States has consistently opposed the recognition of German confiscatory and discriminatory laws, decrees and acts, and in this connection it referred to the Inter-Allied Declaration on Axis Acts of Dispossession of January 4, 1943; the Gold Declaration of February 22, 1944; Law No. 1 of the Allied Control Council; Military Government Law No. 1 (implementing certain provisions of J. C. S. 1067); and Military Government Law No. 59 dealing with Restitution of Identifiable Property. Accordingly, the Department of State was of the view that it is against the policy of this Government to accord any validity to the German confiscatory and discriminatory laws, decrees and acts insofar as they may be concerned in the consideration of claims filed against vested German assets. The Office of Alien Property, therefore, will not assert as a defense to debt claims filed under Section 34,

decrees, laws and regulations of the former government of Germany, enacted or promulgated during the period between January 30, 1933 and May 8, 1945, which discriminated against individuals because of membership in a political, racial or religious group.

I might add that the Department of State in reaching its conclusion gave consideration to the *Bernstein* case (163 F.2d 246 (C.A.2d, 1947)), and in this connection pointed out that there the court rested on what it stated to be the assumed executive policy, without, however, benefit of any indication from the executive branch as to what was in fact the executive policy.

Sincerely yours,

/signed/ David L. Baželon
David L. Baželon
Assistant Attorney General
Director, Office of Alien Property

APPENDIX B — TATE LETTER, APR. 13, 1949

THE DEPARTMENT OF STATE BULLETIN

* * *

Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers

[Released to the press April 27]

As a matter of general interest, the Department of State publishes herewith a copy of a letter of April 13, 1949, from Jack B. Tate, Acting Legal Adviser, Department of State, to the attorneys for the plaintiff in Civil Action No. 31-565 in the United States District Court for the Southern District of New York.

The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Copies of the letter were also sent to the court and to the attorneys for the other parties to the litigation. The letter is as follows:

April 13, 1949

Appendix B

BENNETT, HOUSE, & COUTS,
Counselors at Law,
44 Wall Street,
New York 5, New York.

SIRS: You have brought to the attention of the Department Civil Action No. 31-555 now pending in the United States District Court for the Southern District of New York between Arnold Bernstein, plaintiff, and N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, also known as Holland-America Line, defendant, and Chemical Bank and Trust Company, third-party defendant, which involves certain matters treated in the case of Bernstein *v.* Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (C. C. A. 2d 1947), cert. den. 332 U.S. 772 (1947).

You have pointed out that the Circuit Court of Appeals in the Van Heyghen case stated:

> ". . . a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such." (page 250)

> ". . . no court will exercise its jurisdiction to adjudicate the validity of the official acts of another state." (pages 249-250)

The court held that the Executive had not "acted to relieve its courts of restraint upon the exercise of their jurisdiction" (page 250) or had not "indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar". (page 251) It was therefore concluded that in the circumstances the court was without power to inquire

into the acts of spoliation alleged to have been perpetrated on Bernstein in Germany in 1937-1938 in which Nazi officials of Germany were claimed to have been participants.

You have inquired whether the Department might care to express its view concerning the Executive policy of this Government with respect to the exercise by courts of this country of jurisdiction in such cases. The Department considers the matter an important one and is pleased to express its views as follows:

1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls. In this connection reference is made to the following:

a. Inter-Allied Declaration against Acts of Dispossession of January 5, 1943, United States Economic Policy toward Germany (Dep't State Pub. 2630) 52;

b. Gold Declaration of February 22, 1944, 9 Fed. Reg. 2096 (1944);

c. The Potsdam Agreement of August 2, 1945, 13 Dep't State Bull. 153 (1945);

d. Directive to the Commander-in-Chief of the United States Forces of Occupation Regarding the Military Government of Germany, April 1945, JCS 1067, paragraphs 4(d), 43(e)(2), 13 Dep't State Bull. 596 (1945);

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e. Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany, July 11, 1947, paragraph 17d, 17 Dep't State Bull. 186 (1947);

f. Law No. 1 of the Allied Control Council (Off. Gaz. of the Control Council for Germ. No. 1, Oct. 29, 1945);

g. Military Government Law No. 1 (Mil. Gov. Gaz.-U.S. Zone June 1, 1946);

h. Military Government Law No. 52, secs. 1(f), 2 (Mil. Gov. Gaz.-U.S. Zone June 1, 1946);

i. Military Government Law No. 59 on Restitution of Identifiable Property (Mil. Gov. Gaz.-U.S. Zone Nov. 10, 1947).

2. Of special importance is Military Government Law No. 59 which shows this Government's policy of undoing forced transfers and restituting identifiable property to persons wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945 for reasons of race, religion, nationality, id ology or political opposition to National Socialism. Article 1(1). It should be noted that this policy applies generally despite the existence of purchasers in good faith. Article 1(2).

3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Appendix B

Copies of this letter are being transmitted to Judge Sylvester J. Ryan and to the attorneys for the other parties to the litigation.

Very truly yours,

JACK B. TATE
Acting Legal Adviser

* * * *

APPENDIX C — HABSBURG ARTICLES

profil No. 24/03 of 06.06.2003 page: 31
Department: Austria

Habsburg recycling

Restitution. Much ado about the Habsburgs' chief consultant on issues of restitution: former US politician Stuart Eizenstat now uses his insider knowledge as a lobbyist.

It was a convincing performance. When Christian Habsburg-Lothringen, grandson of Emperor Karl I, gave a press conference little less than one month ago at which he announced the Habsburg clan's claims for restitution against the Austrian Republic of an estimated total of 200 million Euro he got himself a widely-known assistant: former US Deputy Minister of Finance Stuart Eizenstat.

In his capacity as the representative of the US government over the past couple of years Eizenstat had headed successful negotiations on restitution with Switzerland and Germany. The chief US negotiator also came to a comprehensive understanding on restitution with the Austrian Federal Chancellor Wolfgang Schüssel as recently as at the beginning of 2001. This man therefore is enjoying a top reputation in this field. And as an expert Eizenstat was then sitting next to Habsburg and said on the claims of the Habsburg family, "There is no doubt that the Habsburg family are victims of the National Socialist regime."

Eizenstat, who in the present Bush administration is no longer holding any political office, officially acts as "consultant" to the former Imperial family in the Habsburg case. In an interview with the daily "Der Standard" Eizenstat defined his role as follows, "Carl-Ludwig Habsburg contacted me

out of the blue and told me his family history. He convinced me to help me."

Swapping roles. Eizenstat's activities, however, cannot be explained through mere selflessness. So far the Austrian public has not been enlightened about all the details of the cooperation between the Habsburgs and Eizenstat. In addition to his work for the law firm of Covington & Burling the former politician since the end of 2001 has been working as a lobbyist for APCO Worldwide, one of the world's largest lobbying firms. In an interview with the "Public Affairs Newsletter" Brad Staples, the boss of APCO-Europe, showed himself highly satisfied about his new employee. Says Staples, "With Eizenstat we can offer our customers unique experience on a top level in both the US as well as European governments."

A bonus from which the Habsburg family obviously also wants to benefit. Representatives of Jewish organisations, however, are little enthusiastic about Eizenstat's activities. They accuse him of misusing his reputation in the negotiations on restitution to now as a lobbyist gain advantages for a new client. Andreas Reiner, legal counsel of Christian Habsburg-Lothringen, cannot understand the fuzz, "I have never heard about APCO before. Stuart Eizenstat is part of our team because he is an excellent lawyer and is familiar with the matter second to none. He just wants to consider all the victims for restitution."

Picture: Eizenstat (right) as lobbyist with Christian Habsburg-Lothringen
New job for former US politician
Picture: Eizenstat as negotiator with Schüssel (2001): top reputation in questions of restitution.

Appendix C

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The New York Times

May 10, 2003, Saturday, Late Edition-Final

SECTION: Section A; Page 3; Column 1; Foreign Desk

LENGTH: 635 words

HEADLINE: **Hapsburgs** Ask **Austria** to Return Estates Seized by Nazis

BYLINE: By PETER S. GREEN

DATELINE: PRAGUE, May 9

BODY:

The heirs to the **Hapsburg** dynasty, whose forebears ruled central Europe for over 600 years in an empire that once stretched from Russia to Spain, have asked the Austrian government to return forests, homes and a palace seized by the Nazis on the eve of World War II.

But their use of a law intended primarily to aid Jewish victims of the Holocaust has angered some in Vienna's Jewish community.

Christian von Hapsburg-Lothringen, a nephew of Otto von **Hapsburg,** the former pretender to the defunct **Hapsburg** throne, says the family wants back the more than $200 million worth of forests as well as four apartment buildings and the Laxenburg Palace near Vienna.

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The family was awarded the properties as compensation in 1918 when Emperor Charles I was forced to abdicate under the armistice agreement that ended World War I, which had been precipitated by the assassination of a **Hapsburg** archduke.

The **Hapsburgs** have enlisted the aid of a former American diplomat, Stuart Eizenstat, who negotiated the 1999 accords that won **Austria**'s Jews and others compensation for their suffering during the Holocaust.

Mr. Eizenstat, now a lawyer in Washington, said the **Hapsburg** family was seeking the return of about 60,000 acres of forest and, if it did not get back the buildings, either similar buildings in state hands or a total of $2 million from a special fund set up to compensate victims of the Nazis, including Jews, homosexuals, Gypsies and Hitler's political opponents.

The **Hapsburgs'** rule ended in 1918 when the family was forced to abdicate at the end of World War I. The Austro-Hungarian Empire, over which the **Hapsburgs** presided, was broken up and the family was awarded the land and buildings as a form of state pension. But when the Nazis occupied **Austria** in March 1938, the property was confiscated.

There is little doubt that the **Hapsburgs** lost their property because they opposed the Nazis. Otto von **Hapsburg** spoke out in **Austria** against Hitler and warned of dire consequences for Austria in the event of Anschluss, the incorporation of **Austria** into Germany.

Three of Otto's cousins enlisted in the United States Army and fought against the Nazis in World War II. A fourth cousin, Robert von **Hapsburg,** flew with the Royal Air Force against the German Luftwaffe during the Battle of Britain, in 1940. In exile in France, Otto and Carl-Ludwig

von **Hapsburg** helped persuade a diplomat from neutral Portugal to issue visas to thousands of Jews fleeing the Nazi advance, also in 1940.

"I was absolutely astounded by their story," said Mr. Eizenstat, speaking by telephone from Vienna. Mr. Eizenstat said that in 1999, Carl-Ludwig and Felix von **Hapsburg** were recognized by an Austrian court as victims of the Nazis, and were paid a symbolic sum of about $5.000 each, which, he said, they promptly donated to Jewish charity.

For decades, **Austria** refused to acknowledge that it was an active part of Hitler's Germany. Only in the 1990's did it finally agree to compensate most of the victims of the Holocaust and the Nazi era.

The **Hapsburgs'** claim has angered some representatives of Vienna's Jewish community, who fear that it will serve as a further excuse for **Austria** to delay compensation payments from a $210 million fund for Nazi victims, whose creation was negotiated by Mr. Eizenstat.

On Thursday, the Vienna Jewish Community announced that it would have to end its religious and educational programs unless the Austrian fund began to pay the compensation.

Mr. Eizenstat said the **Hapsburgs'** claim would not affect claims by Jewish victims of the Holocaust.

"We are not competing here with Jewish victims for compensation," Mr. Eizenstat said. "We purposely made the law so that it was not just for Jews but for all victims of national socialism."

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http://www.nytimes.com

GRAPHIC: Photos: Shortly after seizing **Austria** in the Anschluss in March 1938 and his triumphal entry into Vienna, Hitler confiscated properties that were awarded to the **Hapsburgs** when they abdicated following World War I. The **Hapsburgs**, who had ruled Central Europe for 600 years until 1918, had opposed the Nazi takeover of **Austria** before the outbreak of World War II. (Hulton Getty/Corbis); Otto von **Hapsburg** has hired an American lawyer to press his case. (A. Pauli/S. Brauer Photos)

LOAD-DATE: May 10, 2003

Appendix C

Translation of Article from the daily newspaper "Der Standard", online issue dated June 11, 2003

derStandard.at/Politics/Opinion/Comments

"The Others' Comment": Fairness for Habsburg!
Debate on Compensation: Stuart E. Eizenstat responds to Josef Cap

I have great respect for Mr. Josef Cap and recognize his support, and that of the SPÖ, for the treaty of 2001 between Austria and the US. Nevertheless, I must protest against unjustified statements with respect to the restitution applications of the Habsburg family, published in this column ("Habsburg on the High Horse" (Habsburg auf hohem Ross), STANDARD, May 23). Mr. Caps seems to ignore historical facts and fundamental principles of the General Settlement Fund Law.

The assertion of Mr. Cap that "the Austrian people were entitled to" the assets of the Family Maintenance Fund (FVF), the restitution of which the Habsburg family demands, contradicts the extensive historical documentation with respect to the FVF's assets, such as the book by Mikoletzky published in 1961. Historical reviews show that the FVF's assets were always the family's private assets, and never state assets or assets which were taken from the Austrian people, as Mr. Cap asserts. Austria returned these assets to the Habsburg family in the thirties. In 1939, Hitler confiscated these assets as an act of political revenge.

Mr. Cap's legal assertions are also incorrect. It must be emphasized that the application to the Constitutional Court (VfGH), mentioned by Mr. Cap, was rejected solely on procedural grounds. The Supreme Court (OGH) decision of

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1995 was not yet based on a restitution claim of the Habsburg family (up to now, such claims have never been raised in court). Prof. Georg Graf, a member of the Austrian Historical Commission, in his official report to the commission in the past year voiced grave doubt concerning the correctness of the decision of 1995, and he reaches the result that the restatement of the constitution of 1933 in the year 1945 did not put the Republic of Austria "into lawful possession" of the assets of the FVF, and that the Habsburg Law of 1919 does not prohibit restitution.

In a decision of the year 1980 interpreting the Habsburg Law, which Mr. Cap does not mention, the Administrative Court (VwGH) states: "It contradicts all fundamental principles of Western legal systems to tie legal disadvantages . . . . only to the fact that the individual concerned comes of a certain family". This also applies to the Austrian legal system.

My engagement in this matter began at the end of 2001, long after the conclusion of the treaty in January 2001 between Austria and the US, and after my return to the private sector. I had never met the family before, nor heard of these claims. After thorough research, I decided to offer my support.

During the Second World War, the Habsburg family often opposed Hitler, thereby actually putting their lives at risk, and attempted to unify the Austrians against Hitler. After the "Anschluss", several family members served in the armed forces of the Allies, and supported Austrian Jews who fled from France. These are acts to be praised morally, which are recognized by the American Jewish community, as the express support of the restitution demands by Rabbi Andrew Baker and the "American Jewish Committee" shows. It is to be emphasized that the Habsburg family's restitution

demands in no way "compete" with the demands of Jewish victims.

The General Settlement Fund Law provides that all those shall be entitled to restitution, "who were persecuted by the Nazi regime on political grounds". This also includes the Habsburg family. Its status as descendants of the former monarchs of Austria-Hungary should be neither a special advantage, nor a special disadvantage. I do not see anything "disrespectful", as Mr. Cap has put it, in the family's restitution application. The aim of the General Settlement Fund Law is to set up a neutral arbitration body for demands arising from the Nazi era, and to keep these demands out of a politically-charged atmosphere. It was a considerable achievement, which has been made possible by the efforts and openness of Chancellor Schussel and others, among them also Mr. Cap. We all should respect the procedure provided by the General Settlement Fund Law, and permit the arbitration body to decide on the claims objectively and fairly, without political interference. (Translation [i.e., w the German newspaper article]: Michael Walker/ DER STANDARD, Print issue, June 12, 2003)

I confirm with reference to my oath at the above translation corresponds exactly to the attached photocopy.

Wien/Vienna, June 26, 2003

s/ Christian Malburg
Mag. Christian Malburg

No. 03-500

Supreme Court, U.S.
FILED
NOV 25 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

REPUBLIC OF AUSTRIA AND ÖSTERREICHISCHE INDUSTRIEHOLDING AG,
Petitioners,

v.

DORIT WHITEMAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

REPLY TO BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

No. 03-500

REPUBLIC OF AUSTRIA AND ÖSTERREICHISCHE INDUSTRIEHOLDING AG,
Petitioners,

v.

DORIT WHITEMAN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE WHETHER THE FSIA'S COMMERCIAL-ACTIVITY EXCEPTION CAN BE APPLIED RETROACTIVELY.

By granting the petition for certiorari in *Altmann* v. *Republic of Austria*, 317 F.3d 954 (CA9 2002), *cert. granted*, 124 S.Ct. 46 (2003) (No. 03-13), the Court recognized that retrospective application of the expropriation exception of the FSIA presents an important question that warrants review. 28 U.S.C. §1605(a)(3). This case presents the same core retroactivity question in a broader context that involves not

only the expropriation exception, but also the commercial-activity exception that is at the heart of the split among the circuits.[1] *Compare Joo* v. *Japan*, 332 F.3d 679, 687 (CADC 2003) (holding that the commercial-activity exception cannot be applied retroactively); *Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (CA2 1988) (*per curiam*) (same); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497-98 (CA11 1986) (same), *with Whiteman* v. *Republic of Austria/Garb* v. *Republic of Poland*, Pet. App. 1a (requiring factual inquiry into Austria and Poland's immunity from suits alleging commercial-activity exceptions); *Abrams* v. *Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (CA2 2003) (same regarding France), *petition for cert. filed*, 72 U.S.L.W. 3154 (U.S. Aug. 19, 2003) (No. 03-284); *cf. Altmann*, 317 F.3d, at 967 (distinguishing commercial activity from the expropriations in that case).

Whether the FSIA exceptions can be applied to events occurring when the United States recognized no exceptions to foreign-sovereign immunity is an issue of great consequence to the United States's present relations with foreign nations. *See* U.S. *Altmann* Amicus Br. 1. Because this case involves a broader application of the retroactivity issue than the one presented in *Altmann*, the Court should grant this petition to ensure that the Republic of Austria and its instrumentalities—indeed all foreign sovereigns—have the benefit of consistent statements of United States law on that significant question. *See* Japan *Altmann* Amicus Br. 1-3; Mexico *Altmann* Amicus Br. 1-2; Societe Nationale des Chemins de Fer Francais *Altmann* Amicus Br. 1. At a minimum, the Court should hold this petition until it resolves *Altmann*. *See* U.S. *Altmann* Amicus Br. 20 n.15.[2]

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[1] *See* Br. Opp'n 2 ("[The commercial-activity exception] is a principal predicate for the complaint herein.").

[2] This reply focuses on the legal issues relevant to the petition and does not attempt to address each of respondents' baseless allegations and

Contrary to respondents' suggestion, the Court should review the court of appeals's holding now, because the Second Circuit has conclusively adopted a fact-intensive approach and Austria seeks review of the propriety of that legal test. The factual inquiry contemplated in the Second Circuit's remand imposes a burden that effectively strips Austria of the very protections that immunity from suit provides. *See Mitchell* v. *Forsyth*, 472 U.S. 511, 525-26 (1985). An ad hoc retroactivity analysis deprives foreign states of the benefits of immunity from litigation, as illustrated by the ongoing litigation burdens imposed on Austria, France, and Poland under the Second and Ninth Circuits' recent holdings. *See Whiteman/Garb*, App. 1a; *Abrams*, 332 F.3d, at 186-88; *Altmann*, 317 F.3d, at 954.

A. The United States Recognized No Exceptions to Absolute Foreign-Sovereign Immunity Before 1952.

No exception to foreign-sovereign immunity existed prior to the issuance of the Tate Letter in 1952, and retrospective application of either the commercial-activity or the expropriation exception should be equally precluded by the strong presumption against retroactivity. *See Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951-52 (1997) (holding that a statute that "*creates* jurisdiction where none previously existed . . . speaks not just to the power of a particular court but to the substantive rights of the parties as well" and, therefore, triggers the presumption against retroactivity).

As the Tate Letter itself makes clear, the commercial-activity exception to foreign-sovereign immunity came into

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polemic accusations against the Republic of Austria, the Austrian government, and the Austrian people as a whole. Those attacks are unfounded and immaterial to whether the petition should be granted.

being only with the adoption of the restrictive theory in 1952. The commercial-activity exception was the only exception to absolute immunity reflected in the restrictive theory, which was motivated by immune sovereigns' involvement in commercial activity:

> "[T]he widespread and increasing practice on the part of governments of engaging in commercial activities *makes necessary* a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons *it will hereafter be* the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 714 (1976) (emphasis added) (reprinting Letter from Jack B. Tate, Acting Legal Advisor of the State Dep't, to Acting Attorney General Philip B. Perlman, dated May 19, 1952); *accord Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983).

Prior to that letter, "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden*, 461 U.S., at 486.

Ignoring history and this Court's precedent, respondents erroneously assert that *Bank of the United States* v. *Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904 (1824), established the commercial-activity exception to foreign-sovereign immunity in 1824. *Planters' Bank*, however, merely held that Georgia's noncontrolling interest in an otherwise privately held defendant bank did not render a suit against the bank a suit against the State. *Id.* at 908. *Planters' Bank* did not inject the commercial-activity exception into America's foreign-sovereign-immunity law, as the Court made clear in *Berrizi Bros.* v. *The S.S. Pesaro*, 271 U.S. 562, 574 (1926) (affirming the rejection of a prior court's ruling, relying on

Planters' Bank, that an Italian merchant ship was not entitled to sovereign immunity).[3]

At most, cases like *Planters' Bank* and *The Pesaro* foreshadowed the conceptual difficulties of reconciling absolute sovereign immunity with the reality that governments and government-owned entities sometimes engage in activities that are not consonant with sovereignty-based immunity. It was the dramatic upsurge of this phenomenon in the twentieth century that motivated both the development of the restrictive theory in other nations' courts and the State Department's adoption of that theory in 1952. *See* Tate Letter, *Alfred Dunhill*, 425 U.S., at 714; *accord* Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 36-37 (1978). It is clear from the historical record, as examined in the Court's precedent, that United States foreign-sovereign-immunity law recognized no exceptions until the Tate Letter issued. *E.g.*, *Verlinden*, 461 U.S., at 487; *accord* von Mehren, *supra*, at 41 ("[B]y the middle of the 1940's, the United States' attitude towards foreign sovereign immunity . . . had retained the absolute theory."). Therefore, Austria was entitled to absolute immunity at the time of the events underlying this case and *Altmann*.

B. This Case Illustrates the Difficulty and Uncertainty Inherent in the Second and Ninth Circuits' Ad Hoc Approaches to FSIA Retroactivity.

Respondents do not dispute that the expropriation exception to foreign-sovereign immunity did not exist before the FSIA. Their argument regarding that exception is confined to an attack on Austria's expectations of immunity that mirrors,

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[3] *See The Pesaro*, 13 F.2d 468, 469 (S.D.N.Y. 1926) (repudiating the decision in *The Pesaro*, 277 F. 473,483 (S.D.N.Y. 1921), which relied on *Planters' Bank* to hold that the Pesaro's commercial character stripped it of sovereign immunity).

in tone and content, the approach adopted by the Ninth Circuit in *Altmann*. Respondents' attack aptly illustrates the difficulties inherent in any ad hoc approach to foreign-sovereign immunity and the strain that subjecting foreign sovereigns to such uncertainty places on international relations. Indeed, it contradicts the United States's express and unequivocal position, supported by contemporaneous documentation, that it has always regarded Austria as a sovereign that had a settled expectation of immunity regarding conduct occurring before 1952. As the United States made clear, neither Austria's sovereignty—nor immunity—lapsed after the *Anschluss* or during the post-war Allied occupation. U.S. Letter Brief (May 2, 2003), *Whiteman/Garb*, Nos. 02-7844 and 02-9361, in the United States Court of Appeals for the Second Circuit, 4-10;[4] *see also* Pet. App. 68a-72a.

The diametrically opposed immunity conclusions drawn by respondents and the *Altmann* court, on the one hand, and the United States, on the other hand demonstrate the futility of attempting to resolve FSIA retroactivity on a case-by-case basis—even when analyzing the same mass of historical material. That inherent unpredictability results not only in judicial inconsistency, but also in intolerable uncertainty for

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[4] Respondents' theory that Austria ceased to exist as a *de facto* state after the German *Anschluss*, and, therefore, was not a sovereign during the Holocaust era, is entirely inconsistent with their theory that Austria may be held liable for acts of the Nazi Regime. *See* U.S. Letter Br. (May 2, 2003), at 10 ("[W]e note that even if plaintiffs could prove that the United States had, prior to the Moscow Declaration, definitely accorded *de jure* recognition to the Anschluss, it would not support the exercise of jurisdiction over plaintiffs' claims. If Austria ceased to exist as a state at the time of the Anschluss, then it could not be held directly liable for any of Germany's acts.") Moreover, respondents have consistently acknowledged, and do not dispute in their brief in opposition, that their only conceivable basis for jurisdiction over Austria is the FSIA, which applies solely to foreign states and their instrumentalities. *See* 28 U.S.C. §1603.

the Executive Branch in its diplomatic activities. For example, the General Settlement Fund (GSF) to comprehensively resolve outstanding restitution claims was negotiated by the United States and Austria in light of the previously well-settled understanding that foreign sovereigns were absolutely immune from private suit in United States courts during the World War II-era. *See* Pet. App. 49a-54a, 70a-72a; U.S. *Altmann* Amicus Br. 18. The GSF is consistent with the United States's longstanding policy to diplomatically resolve World War II-era claims on a government-to-government basis, *see Am. Ins. Ass'n* v. *Garamendi*, 123 S.Ct. 2374, 2390 (2003), rather than through individual restitution suits.[5]

Foreign sovereigns negotiating with the United States for the resolution of decades-old international grievances should not have to do so within an unpredictable sovereign-immunity structure that depends on the vagaries of whether contemporaneous documentation of Executive Branch views exists and the interpretation of such material by individual courts. Nor should foreign sovereigns' amenability to suit depend on the accident of which circuit's precedent governs their immunity defense. *See, e.g.*, *Joo*, 332 F.3d, at 687 (holding that the FSIA's commercial-activity exception cannot be applied retroactively to confer jurisdiction for claims arising from Imperial Japan's World War II-era conduct).

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[5] Respondents erroneously suggest that statements by the United States expressing an unwavering policy of undoing Nazi expropriations necessarily also signal an intent to deprive Austria of absolute immunity from private suits in United States courts. To the contrary, such statements underscore the Executive Branch's policy of resolving war-related claims through diplomacy, not abrogation of foreign sovereigns' immunity. *See Deutsch* v. *Turner Corp.*, 317 F.3d 1005, 1023-24 (CA9), *cert. denied.*, 124 S.Ct. 132-33 (2003).

II. THE COURT SHOULD RESOLVE THE THRESHOLD POLITICAL-QUESTION ISSUES RAISED BY THIS CASE.

The recent proliferation of World War II-era suits against foreign sovereigns also raises significant justiciability concerns that warrant the Court's attention and are squarely presented by this case. Justiciability, like jurisdiction, is a threshold issue, *United States* v. *Sperry Corp.*, 493 U.S. 52, 66 (1989), and should be decided at the earliest stage of the proceedings. The Court should grant the petition to clarify that suits involving war-related restitution claims present nonjusticiable political questions and must be dismissed.

As illustrated by respondents' diatribe against the Austrian government, Austria's politicians, and Austria's internal and international diplomatic efforts to resolve the restitution issue—including the United States-supported GSF—an ad hoc approach to immunity is fraught with political questions. Recognition of foreign sovereigns is entrusted to the Executive Branch and is outside the competence of the courts. *See Nat'l City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 137-38 (1938). Similarly, claims raising successor responsibility of a foreign sovereign, like the alleged responsibility of the present-day Austrian government for acts of the German Nazi Regime, are nonjusticiable. *767 Third Ave. Assocs.* v. *Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 160-61 (CA2 2000).

This case presents the additional unique circumstance of directly interfering with the implementation of the GSF—Austrian legislation that resulted from an international agreement that the Executive Branch expressly endorses as the exclusive remedy for redress of respondents' claims. *Cf. Garamendi*, 123 U.S., at 2390 ("The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy . . . and . . . securing private interests is an express

object of diplomacy today."); Pet. App. 47a. To prevent further disruption of international diplomatic efforts to resolve war-related claims, the Court should grant the petition and confirm that private suits seeking broad restitution remedies for World War II-related conduct present nonjusticiable political questions.

CONCLUSION

The Court should grant the petition for writ of certiorari or, in the alternative, hold the petition pending resolution of *Altmann*.

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